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I

Upon the acquisition of the territory now comprised within the Western States the United States became vested with all proper rights in that territory, except vested private rights and such Indian rights as the United States might choose to recognize, and also became the full sovereign thereof. There-

CITATIONS.

CASES.

UNITED STATES STATUTES.

MISCELLANEOUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE STATE OF WYOMING, COMPLAINANT, v. THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY.	No. 5, Original. In equity.

BRIEF FOR THE UNITED STATES.

Introductory statement of contentions of Wyoming and Colorado and position of United States.

This brief on behalf of the United States is respectfully submitted in response to the order of this court herein requiring a reargument as to the principles of law that should govern the decision of this cause and directing that copies of the record and briefs be submitted to the Attorney General.

Wyoming seeks an injunction prohibiting a certain specific diversion and use in Colorado of a part of the waters of the Laramie River, an interstate stream. Wyoming seeks to protect rights that it claims for

itself as a sovereign State, and rights that it claims on account of State ownership of riparian lands, and also the individual rights of its citizens. It denies the right of Colorado to permit the waters in question to be taken beyond the watershed. It pleads the case in such a way that it can rely upon the pure doctrine of prior appropriation or upon the riparian doctrine, if the riparian doctrine should be upheld as between individuals or as between two States, or, as we take it, upon any rule of division that this court may decide to be the proper one between States.

Colorado in its answer says that the waters of the Laramie River rise in the mountains of Colorado; denies that they have been fully appropriated; alleges certain priorities in Colorado; and claims that there is ample water for all appropriations so far made in both States. Colorado, however, goes further and asserts that as a sovereign State it not only has a right to assert and urge the claims of its citizens, but that it, in its sovereign capacity, is the ultimate owner of all of the waters within its territorial borders, as one of its natural resources, and may do with them as it will.

Colorado, as we understand it, also takes the position that if two States as against each other have rights *in invitum* in streams that flow through the lands of both, there should be applied the doctrine of a reasonable and equitable sharing by the two States of the benefits in the interstate stream, and that under that doctrine the 91,000 acre-feet of

water that it claims on account of the particular diversion here complained of does not constitute an unreasonable trespass upon Wyoming, because after this diversion is made there would be left a reasonable amount of water in the river for use in Wyoming.

We do not understand that the position of Colorado as above outlined, which was that originally taken, is intended to be changed by its brief on rehearing; but we think it proper to state here that in that brief the proposition that States have rights as against each other in interstate streams which, under some circumstances, would have to be adjusted by this court, seems to be conceded. The principles upon which such a controversy should be decided, other than the broad one of equality between the States as sovereigns, we do not find stated in Colorado's brief; nor have we been able to find there the views of the writers as to what facts should be taken into consideration in determining the amount of water each State would be entitled to or what test ought to be applied to find out whether the use of the stream by one State infringed the rights of the other.

Wyoming, in its brief on rehearing, takes the position, if we understand that brief properly, that priority of appropriation should govern between States as it does between individuals, with the exception that between States the uses ought to be confined to the watershed.

The contention of the Government is that the principles sought to be upheld by both Colorado and

Wyoming, failing as they do, to recognize the proprietary rights of the United States in the waters of innavigable streams upon lands that at one time were all public, and seeking a solution of the problem of interstate streams without taking into account such Federal ownership or the grants of water rights made under the acts of Congress, are unsound in law and opposed to the vital interests of the United States, and, if established, might be fatal to important Government policies and result in an almost inextricable confusion of water rights in such streams. The attitude of the executive branch of the Government, as expressed by the Attorney General in his 1914 report, page 39, is briefly that the United States has not surrendered to the States or lost to them or parted in any way with its original right to use the surplus waters (those not appropriated under its own laws) of innavigable streams in the Western States. Our position is that the United States is and always has been, since the cession of the territories now comprised in those States, the owner of all the unappropriated and surplus waters; that the appropriated waters there have been granted by the United States under its own laws, using local customs and State laws as subordinate instrumentalities only; that the rights of the States, both as the actual owners of lands granted to them and as the ultimate owners of the property of their citizens, so far as they may be said to be such owners, are confined to such water rights as have been granted by the United States to them or their citizens under the laws of Congress; and that

controversies such as this should be decided upon the basis of such Federal grants, and without regard to State boundaries.

The effect of these questions upon the public interests and governmental policies of the United States.

In the Western States, which comprise the arid regions of this country, water for irrigation is of the utmost importance. The United States in that territory is still the owner of more than 505,000,000 acres of land. It is also the owner of over 375,000,000 acres in Alaska. This land is held by the Government for the benefit of the whole people, and the Government is under a moral obligation to guard, reserve, and dispose of it in ways that will best serve the interests of the country at large.

Reclamation policy.

The adoption of the reclamation policy is one of the ways in which Congress has undertaken to discharge that duty. Twenty-seven projects (Annual Report Reclamation Service, 1915–16, pp. 659–661) looking to the reclamation by irrigation of 3,117,862 acres of land have already been undertaken. (Same report and pages.) On these projects $109,885,140 have been expended in dams, canals, and other irrigation works. Of the total irrigable land under these projects, 629,036 acres have been entered by private persons, and the entrymen with their families number over 100,000 persons. (Annual

Report Reclamation Service, 1915–16, p. 20.) The lands in private ownership when the projects were undertaken, which are to be irrigated as a part of the projects, comprise 1,522,168 acres. (Same report, p. 661.) The projects also include in the total land to be irrigated 331,470 acres of Indian lands and 114,620 acres of lands belonging to the States. (Same report and page.)

As to the right of these settlers to the use of the water necessary for the irrigation of their land, even in those instances where the water has already been applied to that purpose, there would be a serious question in case the original title of the Government were not upheld. The Government has not been able to comply with the local laws in all instances, and, furthermore, its right to become an appropriator would very likely be assailed. These private water users might then be unable to show a title to the water they were using based upon properly instituted steps taken to initiate a water right, in which case their rights would date from the time the water was applied to the beneficial use instead of relating back to the commencement of the project. The situation of entrymen where water has not been applied would be precarious indeed. In those cases, if it were held that the Government had not taken the proper steps under the local law, and therefore no rights were initiated, it would be hard to see how the entrymen, having done nothing of themselves except to enter Government land under the project, could claim water rights. Experience has shown that the undertaking

of a Government project, even in the most preliminary way, stimulates private persons and corporations to initiate appropriations from the streams depended upon by the project. Many private projects so started are carried through before the Government works are completed, and in the cases where they are, the right of the entryman on the Government project to water with the priority contemplated depends entirely upon the validity of the Government's initiatory steps. If that should fail, these entrymen would be subordinated in their rights to rights under the private projects, and this, in frequent instances, would result in their not having sufficient or any water for their own lands.

It is possible for the Government as to future activities to control this situation to a certain extent by the withdrawal of vast areas of land when it undertakes a project, thereby, if the situation is such as to enable it to be done, preserving the Government's priority until it can build its works and apply the water to the land. The Government could in this way prevent access to the stream and also prevent the entry of public lands, under the land laws, for private projects. But the effectiveness of this method of obtaining the desired result would not be great and the locking up of the public domain and prevention of settlement and discouragement of private enterprise involved, if this method were the only one that could be resorted to, would be unfortunate.

Many of the projects involve irrigation of land in two States and most of them depend for the water essential to their success upon interstate streams.

The projects now under way or contemplated are often of a character and magnitude that would prohibit their being undertaken by private or even State enterprise. Some of those that are being investigated would be wisely undertaken only if a comprehensive development of a great stream system could be made and lands in several States could be irrigated. Of this character is the proposed utilization of the available waters of the Colorado River. There reservoir sites in Wyoming, Utah, and Colorado would be used to store water for the irrigation not only of lands in those States but also of lands in California and Arizona.

As another example of the dependence of reclamation projects upon interstate streams, we have the North Platte project in Wyoming and Nebraska. Here the lands to be irrigated, amounting to 230,000 acres, are located in the two States. The water supply comes mainly from a third State, Colorado, and is stored in the Pathfinder Reservoir situated in Wyoming.

It is apparent that when projects involve irrigation of lands in more than one State or depend upon waters coming from States other than those containing the lands to be irrigated, or where in any case the waters on which the project relies do not come from one State, the possibilities of conflict between one or more of the States affected and the Federal

Government would be great, if the control of water were wholly a matter of State law and so beyond the power of the general Government.

Hitherto, very serious conflicts have not arisen, or if they have arisen, practically none of them has been pressed to a determination. Identity of interests and the desire of the States to have the Federal Government undertake extensive works and developments within their borders tend to prevent dissensions. The possibilities of conflict, however, remain, and they are becoming more apparent as the stage of initial development in each case gives place to that in which the project is well advanced. When the Government is already committed to the doing of such new work as will be undertaken, and the time arrives when rights between the States and the Government and between individuals and the Government have to be determined, diversity of interests is likely to work to the prejudice of the success of the project. In only a few cases have the water rights upon which the projects depend, and without which they would represent only useless expenditures of public money and a fruitless development of public lands, been adjudicated. When these rights do come to determination in the courts it is inevitable that all private claimants, whose interests in any way conflict with those of the Government, will question its rights, and it is also becoming apparent that the States may do likewise.

Even where a project is wholly within one State, dependence upon State laws for the acquisition of

water rights might be impracticable, if not actually impossible. As to the projects already undertaken, full compliance with such laws has in some instances been impossible. In such cases the water rights of the projects must rest upon the doctrine of Federal rights above stated. The States, in their local laws, have quite generally departed from the original pure doctrine of appropriation. Under that doctrine in its original form, a vested water right could be obtained by putting the water to a beneficial use, without the intervention of any State agency. Now, the State laws commonly provide that no right shall be initiated except by application to and the permission of State officials, who are usually either the State engineer or some sort of board of water control. These laws are also in many instances unsuited to forming or carrying out great projects, as they seldom, if ever, take account of or provide for the interstate character of such projects or the time which it takes to complete them. Commonly, the local laws fix time limits for the completion of work, which limits are too short for Government projects. Also, they in some instances require work to be carried on under the supervision of State officers who have the right, to some extent at least, to determine whether it is progressing satisfactorily or otherwise is being done in compliance with law, and if their determination is adverse, they have the power, by their orders, either to stop the work or to withdraw from its

continuance the sanction of the local law defining the steps necessary to the vesting of a water right.

As to the future, if the theory of States' rights advanced here by Colorado should prevail, the fate of Government projects would depend entirely upon the permission of one or more States. Of necessity these plans must in many instances be opposed in part to the narrow interests of particular States. It follows that in only rare cases could the Government depend upon the cooperation of the State, and, where necessary, upon obtaining State legislation. Even if the States, at the inception of the project, welcomed the Government's undertaking and were willing to aid the project by such legislation as executive officials of the Government suggested, it would probably be unwise for the Government to undertake the project thus dependent upon State action, as the local view of the interests of the State might change. Moreover, in a large undertaking, it is impossible to foresee all contingencies, and no legislation made at the beginning would assuredly suffice for carrying the project to completion and for taking care of its operation for an indefinite period.

Indian policy.

The Government's interests on account of the Indians are likewise vitally bound up in the questions here involved. The Indian reservations in the arid regions comprise 70,891,091 acres. (Report Commissioner Indian Affairs, 1916, p. 90.) And in addition to this the Government will doubtless from time to

time, as heretofore, create new reservations for the Indians and make new allotments of land to individual Indians out of the public domain. In carrying out its policy of advancing the Indians in civilized life by giving them the means of becoming the owners and farmers of irrigated lands the Government has undertaken numerous and extensive Indian reclamation projects, and has undertaken the irrigation of many individual allotments and Indian homesteads. In that work there has already been expended $13,470,354. (Same report, p. 163.)

The waters flowing on these reservations are necessary parts thereof, and without them the land itself would be of small value in accomplishing the purposes for which the reservations were made. The fulfillment of those purposes and the full utilization of the waters needed therefor is of necessity a slow process. For this reason it is to but a limited extent as yet that the waters have been used, or their use so provided for as to give the Indians water rights valid under State laws. Inasmuch as this is so, and as in many cases the reservations were made after the States were created, the water rights essential to those reservations may be in jeopardy if the States, by their creation as such, became the owners or obtained control of the unappropriated waters within their borders. Such a holding would probably not affect many, if it would affect any, of the reservations made before the creation of the States, especially those made by treaty with the Indians (*Winters* v. *United States*, 207 U. S. 564), but it would seriously cripple all reser-

vations made thereafter, and it is probably not too much to say would disastrously affect the Government's Indian policy.

Nothing can be hoped for the Indian by way of favorable legislation from the States. Temporary State interest is almost always opposed to the protection of Indian rights. The Indians during the period of tutelage, which may be indefinitely extended, do not pay taxes, are backward in enriching the State by the creation of wealth therein, and do not take part in political activities. They are, therefore, the prey of individuals and lack the support of those in authority that white men can confidently count upon because of self-interest.

Other Government property rights and activities affected.

Besides the interest of the Government on account of its public lands and the reclamation and Indian policies, it is vitally concerned with the questions here raised because of its policy to prevent monopoly of water power on the forest reserves and on the public domain in general, and on account of its military reservations, its Public Health Service and other hospitals, and, in short, wherever its vast property rights and its multiple activities in the arid region are affected by or depend in whole or in part upon the use of water.

It would be difficult, indeed, for the Government to pursue any of its major policies looking to the de-

velopment of its lands in the Western States, if its use of water should be held dependent upon the permission of the States, and it is hard to see by what theory the Government would be saved from such dependence if the unappropriated waters of innavigable streams are either owned, or are, in any true sense, under the control of the States.

The question of original ownership of innavigable waters fundamental in this controversy.

In the order of this court requiring reargument, counsel are requested to direct their attention to the rule which they deem should properly be applied to a solution of the controversy; that is, first, whether the rights asserted ought to be tested and determined solely by the application of the general principles of prior appropriation without regard to State boundaries, or, second, whether, on the contrary, the general principles of prior appropriation are subject to be restricted or their application limited in this case by State lines, and if so, by what principles under that assumption the case is to be controlled.

Addressing ourselves to that task we assume at the outset the importance of finding, if possible, a rule to govern rights in interstate streams that will not disturb the local systems of water law and administration now in force; and we assume also that it is necessary, if possible, to preserve the large Government interests and important Government poli-

cies that are bound to be affected by whatever rule is laid down.

The question of original ownership of the innavigable waters on the public lands is fundamental. The Government's contention that such ownership is in the United States is the basis of its position that private vested rights in the use of such waters are obtained by grants from the Federal Government; that water rights not so granted are still its property; and that the remaining waters are and have been available to the Government for use in the reclamation of its lands and otherwise, as well as for appropriation by others under the act of July 26, 1866 (14 Stat. 251, 253). The original and present Federal title to such waters offers a solution of the question of interstate streams. That solution is in harmony with the various systems of water law that prevail locally (they having been erected consciously and perhaps in part unconsciously upon that foundation); preserves vested rights in such streams; gives a sure foundation for public and private interstate irrigation projects; and does not interfere with the power of the States over all property within their dominions that is properly subject to their disposition or control.

ARGUMENT.

PART ONE.

The United States retains its original plenary ownership of the innavigable waters in the Western States, except in so far as it has parted with it through acts of Congress; and this property, like the property in the public lands generally, is wholly immune from State interference or control. The State power affects only those rights which have been granted by Congress.

I.

Upon the acquisition of the territory now comprised within the Western States, the United States became vested with all property rights in that territory, except vested private rights and such Indian rights as the United States might choose to recognize, and also became the full sovereign thereof. Therefore, at the time of such acquisition the United States had complete control over the waters of the innavigable streams and the right of use and disposition thereof, and it still has that right unless it has since parted with it in some way.

It has long been definitely settled that from the time when the territory now comprised in the new States was acquired until the creation of those States, the United States, as the owner of the lands and all else capable of ownership therein except property in private ownership (which was of small extent), and

as the possessor of municipal as well as National sovereignty, could dispose of all classes of property rights in such territory. It was the proprietor of the things which under our law are the subject of private ownership and of course could do with them all that a proprietor could do. (*United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474.) It was also the possessor of local, as well as National sovereignty; and so the ownership, control, and disposition of property and rights of every nature, that under our system pertain either to State or National sovereignty, belonged to it.

Shively v. *Bowlby*, 152 U. S. 1.
U. S. v. *Winans*, 198 U. S. 371.
Winters v. *U. S.*, 207 U. S. 564.

This court in the *Winters* case, *supra*, decided in 1908, held, with reference to a reservation by the United States of waters of an innavigable stream in Montana made when that State was a Territory "that the power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be" (p. 577). The two authorities cited as supporting this proposition were *U. S.* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 702, and the *Winans* case, *supra*. The pertinent doctrine of the *Rio Grande Dam* case is that a State's power to change the common law rule and permit appropriations and so dispose of the waters of the streams within its borders is

limited by its lack of power, "in the absence of specific authority from Congress," to "destroy the right of the United States, as the owner of lands bordering on a stream to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property."

In the *Winans* case, following the reasoning and authority of *Shively* v. *Bowlby*, *supra*, it was decided that the United States had the power to, and in that instance did, reserve for the benefit of the Yakima Indians in Washington, when that State was a Territory, certain fishing rights and the right to occupy shore lands bordering on navigable waters for fishing purposes free from interference by the grantee and licensee of the State.

The doctrine of the *Winters* case is, therefore, that, whether the waters of innavigable streams, like the lands over which they flow, belong to the United States or whether, like navigable waters and their beds and shores, they belong to the States, the United States owned, controlled, and could dispose of them when the States were Territories.

II.

The United States is the owner of the public domain, however acquired. It holds that property under its own laws and not under those of the former sovereign. What property the United States owns, whether it owns it as a proprietor or as the possessor of municipal sovereignty, and the incidents and extent of its ownership, are Federal questions determinable by this court according to its own view of the Constitution and of the common law, in the light of which the Constitution is to be interpreted.

As was said by this court:

> Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own Government, and not according to those of the Government ceding it.
>
> *Pollard's Lessee* v. *Hagan*, 3 How. 212, 225.

The constitutional provision (Art. IV, sec. 3, sub. 2) vesting exclusively in Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," like all parts of the Constitution, "must be read in the light of the common law."

Shick v. *United States*, 195 U. S. 65, 69.

To determine what ownership of its property by the Federal Government means—what incidents and rights are attached to and made a part of that property—we must also turn to the common law as

"the system from which our judicial ideas and the legal definitions are derived" (*Shick* v. *United States, supra*). As said by this court in the case just cited, quoting from *Smith* v. *Alabama*, 124 U. S. 465, 478: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

Since the vesting of the full power over the Federal property in Congress "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise" (*Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; see also, *United States* v. *Insley*, 130 U. S. 263, 265, and *United States* v. *Nashville Ry. Co.*, 118 U. S. 120, 126), the property rights of the United States and their incidents are not to be affected by State laws or by any power whatever save that of the Federal Government. What these incidents are is a question reserved exclusively for the determination of this court according to its own view of the common law of England, brought to this country by our forefathers as a part of their heritage, and its adaptability to conditions here. It was upon this principle that the question of what constituted navigable waters in this country was decided (*Genesee Chief* v. *Fitzhugh*, 12 How. 443), and that the decision was made that such waters and their shores and beds go to the States as the possessors of municipal sovereignty (*Pollard* v. *Hagan*, 3 How. 212, and *Shively* v. *Bowlby*, 152 U. S. 1).

In deciding questions concerning the property of the United States, State laws and the decisions of State courts are considered by this court only as they throw light upon what the common law is. When the question is, what incidents the Federal grantee takes with the title given him by the Government, State laws and decisions are, in certain instances, followed by this court, but for convenience only.

Hardin v. *Shedd*, 190 U. S. 508.

III.

Tested by common-law principles, the innavigable waters belonged to the sole owner of all the riparian lands—namely, the United States—and could be disposed of, like any other real property, as the owner saw fit.

(1) At common law, innavigable waters belong to the owners of the land bordering thereon. Water rights were and are still real property. Rights identical with appropriation rights can be created by the owner of all riparian lands on a stream.

(a) Water rights are usufructuary rights, and when we speak in this brief of ownership of a stream or its waters, we mean ownership of the right to use them as distinguished from ownership of the water itself. The right of use is the substantial property right with which the law has chiefly to deal. Ownership of the corpus of water is of rare occurrence and comparatively unimportant. It does not exist in connection with waters in their natural state.

Failure to distinguish between ownership of the water itself and ownership of the right to use it has

been the cause of confusion of thought in some of the cases, modern as well as ancient. The right to use water is one of the most substantial property rights known to the law and partakes in no way of the transitory character of the water itself which at any particular time makes up the stream in which the right exists. The law does not in a strict sense regard the water flowing in a stream as being owned by those who have the right to use it, or, in fact, as being owned at all. It does, of course, recognize an ownership in water itself when it is confined and treated as a commodity as when, for example, it is bottled for sale. It is then treated as personal property.

On the other hand, the rights which exist in connection with waters in their natural state—rights in waters flowing in a stream or in water of a pond—are rights of use.

Tyler, v. *Wilkinson*, 4 Mason, 397.
Kent, 3 Comm. (Marg.), p. 439.
Embrey v. *Owen*, 6 Ex. 352, 20 L. J. Ex., 212.
Hargrave v. *Cook*, 108 Cal., 72.

Mr. Wiel, in his learned and exhaustive work on Water Rights, thus states the law in this respect:

> This usufructuary right, or "water right," is the substantial right with regard to flowing waters; is the right which is almost invariably the subject matter over which contracts are made and litigation arises. It is not an ownership in the water itself; it is merely a privilege to use the water, and hence purely incorporeal.
>
> *Wiel, Water Rights*, 3 Ed., p. 755.

When therefore we speak in this brief of ownership of a stream or of the water flowing in it, we do so for brevity merely, and refer not to ownership of the water itself, but of the right to use it.

(b) Both at common law and under the appropriation system water rights are real property.

This is established beyond question; also, that title to water rights is of as high dignity as title to lands. There is no authority to the contrary so far as we have been able to find and no difference in this respect between the common law and the doctrine of appropriation.

That a riparian right under the common law is part and parcel of the land, and, therefore, like the land itself and all that constitutes the owner's estate therein, is real property, see:

Long, Irrigation, 2d ed. (1916), sec. 34, p. 70.

1 Wiel Water Rights, 3d ed. (1911), sec. 711, p. 777 *et seq.*, and numerous cases cited.

Chancellor Kent said, in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 166:

> A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers or by due process of law."

It is not an easement.

2 Washburn, Real Property, 6th ed., sec. 1284.

Mr. Washburn, in his work on Easements, 4th ed., pp. 316, 317, says:

> The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring land owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years adverse possession.

It of course passes only by grant or prescription.

That a water right under the appropriation system is real property, see:

1 Wiel, Water Rights, 3d ed. (1911), sec. 283, p. 298.

2 Kinney, Irrigation, 2d ed. (1912), sec. 769, p. 1328.

In Colorado, the leading appropriation State, the courts say:

> Under our decisions a water right is real estate, not personal property.
>
> *Insurance Co.* v. *Childs*, 25 Colo. 360, 363.
>
> In this state the right to the use of water is deemed real estate, and is a distinct subject of grant, and may be transferred either with or without the land for which it was originally appropriated.
>
> *Davis* v. *Randall*, 44 Colo. 488, 492.

Mr. Wiel says:

> A water right by appropriation is not only real estate, but has all the dignity of and is an estate of fee simple, or a freehold.
>
> *1 Wiel, Water Rights*, 3rd Ed. Sec. 285, p. 301.

(c) At common law, innavigable waters are part and parcel of the riparian land. They belong to the owner of such land as an incident of his estate in the land itself. His title to the water is not dependent upon appropriation or prescription and is derived in the same manner as is his title to the land. Such waters are not publici juris.

General expressions by some of the early writers, in which they fail to make the sharp distinction which the law now makes, and in reality always has made, between ownership of the water itself and ownership of the right to use it, and also the existence of prescriptive rights, for a time left some doubt as to whether the riparian owner's right to use the waters on which his land bordered was not dependent in some way upon actual appropriation.

Whatever doubt existed in that respect was put at rest in England by a series of cases of which *Mason* v. *Hill* (5 Barn. & Adol. 1), decided by Lord Denman in 1833, was perhaps the most important. In this country the question had already been disposed of by Mr. Justice Story in *Tyler* v. *Wilkinson, supra* (4 Mason, 397). Since those cases, it has been settled that under the common law, both in England and in the United States, innavigable waters belong to the owner of the land bordering on them; that the

rights of such owners in the water are in no way dependent upon its use; that the water is part and parcel of the land itself; and that title to it has the same origin as the title to the land.

Baron Parke thus states the law:

> The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright* v. *Howard*, followed by *Mason* v. *Hill*, and ending with that of *Wood* v. *Waud*, and is fully settled in the American Courts: see *3 Kent's Comm.*, Lect. 52, pp. 439–445.
>
> The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see *5 B. & Ad.* 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.
>
> *Embrey* v. *Owen*, 6 Ex. 352, 368; 20 L. J. Ex. 212.

In *Tyler* v. *Wilkinson* the question was as to the right of a mill owner to use the waters of the River

Pawtucket, at a point where it is innavigable, as against riparian owners. Mr. Justice Story, as Circuit Justice, took occasion to review the law, and in the opinion he rendered briefly covered the whole subject of the origin and nature of riparian rights in nonnavigable waters. The case is the leading one on the subject. Mr. Justice Story said that he had read over all the cases which were cited at the bar, or which were to be found in Mr. Angell's work on watercourses, or which his own auxiliary researches had enabled him to reach. In part the opinion is:

> The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. * * * * * * Mere priority of appropriation of running water, without such consent or grant [of the riparian owners], confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to use in common, as an incident to the land; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long, exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon

> principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a right or grant.
>
> *Tyler* v. *Wilkinson*, 4 Mason, 397, 401.

As to innavigable waters being *publici juris*, the law is equally well settled. The question is disposed of in the passage just cited from *Tyler* v. *Wilkinson*, by placing the ownership of the waters in the owners of the riparian land as "an incident annexed, by operation of law, to the land itself." It is specifically disposed of in the passage we have just quoted from *Embrey* v. *Owen*. Lord Denman, in *Mason* v. *Hill*, considered it fully and came to the conclusion that there was no foundation in the common law, or in the civil law either so far as he could find, for the idea that such waters are open to occupancy, or that they are *publici juris*, except in the sense that no one owns the corpus of the water while it flows in its natural state.

After referring to many expressions in the law to the effect that flowing waters are *publici juris*, and the passage in Blackstone (2 Comm. p. 18): "Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it," Lord Denman says:

> None of these *dicta*, when properly understood with reference to the cases in which they were

cited, and the original authorities in the *Roman* law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

* * * * *

In the *Digest*, Book 43, tit. 13, in public rivers, whether navigable *or not*, it appears that everyone was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in Section 4 it is said, that private rivers in no way differ from any other private place.

From these authorities it seems that the *Roman* law considered running water, not as a *bonum vacans*, in which any one might acquire a property, but as public or common, *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only.

We think that no other interpretation ought to be put upon the passage in *Blackstone*, and that the *dicta* of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us there is no

authority in our law, nor, as far as we know, in the *Roman* law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

Mason v. *Hill*, 5 Barnewall & Adolphus, 1, 23, 24.

For an exhaustive discussion of the subject of our sub-heading and a full citation of English and American authorities, see *1 Wiel, Water Rights*, 3rd Ed. Sec. 670 *et seq.* p. 740 *et seq.*

(d) Under the common law, rights identical with appropriation rights can be created. The riparian proprietors taken together are considered as owning the stream. The individual proprietor may grant his land and retain the water, grant the water without the land, or grant both separately. All the land owners on the stream acting jointly, or the sole owner, if there is such, may grant rights in the stream that will be absolute instead of relative, and which may be put to a non-riparian use. City water supplies are examples.

The essential differences between the riparian and appropriation doctrines viewed as systems of water right tenure are that, while under the riparian system, water rights are relative and may be used only in connection with the riparian lands, under the appropriation system they are absolute and may be used anywhere. Each riparian owner's right is restricted by the fact that all of the other riparian

owners on the stream have exactly the same right. The guiding principle is equality. Under the appropriation system rights are absolute. Each owner has a fixed right to a certain amount of water with a certain priority. His right must be satisfied to the full before those who have rights of later priority take anything. Riparian rights, as against objection by other riparian owners, can be used only on riparian land, while appropriation rights may be put to a nonriparian use.

The kinds of uses that are permitted under the two systems do not differ greatly if at all. Under the appropriation system all uses that are beneficial are allowed; and under the riparian system the water may be used in any way so long as the use does not constitute an encroachment upon the reasonable needs of other riparian owners, who have exactly the same rights. Since exclusion of all but riparian owners from the benefits of the stream (*Wiel, Water Rights*, p. 862, *et seq.*) and equality between riparian owners are guiding principles of the riparian doctrine, all uses that are reasonable, under the circumstances of the case, must be permitted. Any other rule would deprive the riparian proprietors, as the virtual owners of the stream, of the opportunity to make full use of its benefits. "Streams of water," says Kent (3 Comm. 429) "are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of water to domestic, agricul-

tural and manufacturing purposes." The extent and nature of permitted uses depends upon maintaining a fair balance between the several owners and upon local needs and the circumstances of the case. So, in an arid region where farming by irrigation is of paramount importance, as in California, it would be entirely consistent with the principles upon which the doctrine of riparian rights is founded to permit the whole stream to be diverted for irrigation in proper cases. In such a case each riparian owner would, of course, get his fair share of the water. On the other hand, in a humid region where other uses are of more importance and irrigation comparatively unnecessary, the riparian owner's right to irrigate might be greatly restricted. That irrigation is one of the uses recognized by the common law, though questioned in some of the cases in the pure appropriation States, we think is well settled. The New Jersey court in a late case says:

> That diversion for use upon riparian land and for domestic and agricultural or manufacturing purposes is in its nature a reasonable use is the settled law of this state, and diversion for irrigation has been held to be a reasonable use in accordance with the general American doctrine and the English authority.
>
> *City of Paterson* v. *East Jersey Co.*, 74 N. J. Eq. 49.

See Mr. Wiel's full discussion of this subject and citation of authorities. (1 *Wiel, Water Rights*, 3d Ed. Sec. 749a, p. 817 *et seq.*)

Under the common law, an innavigable body of water taken as a whole is considered as being the property of the riparian owners. Streams and ponds are spoken of as "private" (*Genesee Chief* v. *Fitzhugh*, 12 How. 442, 445) and as being "owned" (*Hardin* v. *Shedd*, 190 U. S. 508, 519) by the owners of the land over which they flow. All the riparian owners on a stream taken together, therefore, may grant such rights in the stream as they see fit. Together they own the entire stream. The whole estate is theirs and they may divide it up or grant it as they like. A sole owner of all the riparian land, of course, has the same privilege.

> 1 *Wiel, Water Rights*, 3d Ed. Sec. 864, last par. p. 904 and note.

Even if one is not the sole owner, he may divide his own estate as he will. He may separate his water right from his land, grant the land and reserve the water right, or grant each separately. (*Goodrich* v. *Burbank*, 12 Allen, 459, 461; *Lonsdale* v. *Moier*, 15 Fed. Cas. No. 8496, p. 836; *Rood* v. *Johnson*, 26 Vt. 64, 71). He may do this as freely as the land owner can subdivide his estate or grant the minerals separately. Of course, he can only give to his grantee what he himself has, and his rights being relative and confined to use in connection with riparian land as against the other riparian proprietors who are co-owners with him of the whole stream, he can not, if they object, grant a water right which will be absolute or one that may be used on non-

riparian land. Even a grant of that kind, however, is valid against himself.

1 *Wiel, Water Rights*, 3rd Ed. Secs. 845, 846, p, 901 *et seq.*

City water rights in the riparian States are obtained in the way just indicated; so, also, rights for any non-riparian use. The city or the irrigation district or the private land owner who wishes to take a certain quantity of water from a stream and carry it away from the riparian lands and use it there must obtain a grant either voluntary or involuntary from all the riparian owners. If only one riparian owner is left outstanding, the acquired rights are defective to that extent. If, however, all are brought in, the non-riparian use is fully legalized and the right to the quantity of water granted is absolute.

Under the common law, therefore, the United States, as the owner of the public lands out of which the Western States were subsequently created and so the owner of all of the lands in that whole vast territory, with the exception of the few Spanish and Mexican grants, was the owner of the innavigable streams and ponds therein and could, in strict compliance with law and as a mere proprietor, convey water rights such as now exist in the appropriation States and such as exist in the dual system States, as well as ordinary riparian rights such as obtain in those of the public land States which hold fast to the pure riparian doctrine. That that is what,

in fact, the United States did, and that all of these systems rest squarely upon the original Federal title, it is our purpose to show.

Appropriation water rights are not new in character. The only thing in connection with them that is unusual is the freedom of their acquisition. Under the policy adopted by Congress the waters on the public lands, like the lands themselves and the minerals in them, have been thrown open to private acquisition under the laws that Congress has thought best suited to accomplish its purposes. The common law is the basis of it all, and every step has been taken, for the most part consciously, in strict accordance with its principles.

> Where all the riparian rights on a stream are dealt with together in one contract, a right similar in result to a public-land appropriation may arise, since all who could complain have contracted away their rights. A severance of riparian rights by a sole riparian proprietor hence is a close counterpart of a public-land appropriation. An "appropriation" is, on the other hand, under the California doctrine, a grant of water on public land from the United States so far as it was in pioneer days a sole riparian proprietor.
>
> 1 *Wiel, Water Rights,* 3d Ed., p. 904.

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IV.

Water rights now vested in others derive their existence, like titles to land, from the acts of Congress. All interest in water not so granted necessarily remains in the United States. The acts grant nothing to the States, and the mere creation of a State could not work a change of this ownership or control.

(1) The earliest acts of Congress affecting innavigable waters—They show full consciousness of power to deal with such waters on the public lands.

Section 2476 of the Revised Statutes provides:

> All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and in all cases where the opposite banks of any stream not navigable belong to different persons the stream and the bed thereof shall become common to both.

This section is but a continuation of early statutes on the subject (acts of May 18, 1796, 1 Stat. 468; March 3, 1803, § 17, 2 Stat. 235; Feb. 20, 1811, § 3, 2 Stat. 642; and March 3, 1811, § 12, 2 Stat. 666), and is referred to in *Railroad Co.* v. *Shurmeir*, 7 Wall. 272, 289; *Scott* v. *Lattig*, 227 U. S. 229, 242; and *Hardin* v. *Shedd*, 190 U. S. 508, 519.

These acts show that from the earliest times Congress has had clearly in mind the difference that exists in the relation of the Federal Government to navigable and innavigable waters. They likewise show that Congress has been fully conscious of

ownership in the United States of the innavigable waters on the public lands and of its own power to say how these waters shall be disposed of.

Those of the acts preceding R. S. 2476, which affected lands beyond the Northwest Territory (acts of February 20, 1811, and March 3, 1811), omitted the above clause referring to innavigable waters. Since the passage of the act of July 26, 1866, which we shall now discuss, the disposition of such waters on the public lands has been controlled by this latter act and by the local laws and customs used as its subordinate instrumentalities.

(2) History and nature of the act of July 26, 1866, granting water and mining rights and rights of way. Purpose and effect of its adoption of local laws and customs.

(a) The occasion of this legislation was the extensive occupation and exploitation of the public lands in the West following the discovery of gold in California. The need was to legalize appropriations of mineral land, rights of way, and water rights already made under local customs and laws, and to provide for the future acquisition of rights of the same character in the same manner.

The occasion and history of this legislation, with specific reference to water rights and water ways, are sufficiently shown by the opinions in—

Jennison v. Kirk, 98 U. S. 453.
Atchison v. Peterson, 20 Wall. 507.
Basey v. Gallagher, Id. 670.
Broder v. Water Co., 101 U. S. 274.

See also—

1 *Wiel on Water Rights,* 3d Ed., Secs. 66 *et seq.*, 92 *et seq.*

1 *Kinney on Irrigation and Water Rights,* 2d Ed., secs. 596 *et seq.*, 611 *et seq.*, 636 *et seq.*

Almost immediately upon the discovery of gold in 1848 a large population sprang up in California and Nevada and the other western territories. Mining, milling, agriculture, and other industries quickly grew to great importance and large communities dependent upon these activities of the miners and settlers, were established. The country thus so suddenly occupied was up to that time a vacant wilderness, most of which had been but lately acquired from Mexico. There was no general mining law, the lands were unsurveyed and there was no efficient statute under which the Government title to land of any character could be acquired. (*Wiel, Water Rights,* 3d Ed. p. 92).

The miners and settlers and the residents of the towns were alike technical trespassers on the lands of the United States. They took out the gold, set up mills for the reduction of ores, cut the timber, and engaged in agriculture. For all of these purposes the use of water was essential, and they diverted it from the streams. All this was done under orderly and firmly established codes of rules made by the miners' meetings in the various communities, the decisions of courts, and later by State and Territorial legislation. The law that thus grew up was purely a law of possessory rights made to regu-

late the acquisition and holding of the Government property by the miners and settlers among themselves and as against each other. It was all subject to the underlying rights and, at that time, unexercised powers of the United States as the owner of the property affected. As to mineral land, the vein or lode was recognized as the thing discovered, and the thing of value; and so the rules gave title to that rather than to so much land and allowed the following of the vein on its dip even though doing so involved going outside of the limits of the surface claim extending vertically downward. As to water, the lands from which it was taken, the lands occupied by the ditches and flumes, and the lands where it was used, whether for milling ores, washing the gold out of the gravel of the hillsides and stream beds, or for irrigation, were all until such occupancy vacant public lands.

If the miner or farmer felt free to appropriate the vein of mineral that he had discovered or the land that he wanted to farm, he felt equally free to take water for those purposes from the most convenient source. The fact that he thereby took the waters from another piece of Government land bordering on the stream made no difference under the circumstances. He could take that land, too, if he wanted it. The rules, therefore, permitted the diversion of water for any useful purpose and recognized the first appropriator's priority of right just as they recognized the priority of the discoverer and first claimant of a vein of mineral. Throughout this period, during

which these possessory rights had come to be of enormous value and had finally been held by the courts to have, between the appropriators, practically all the dignity of freeholds (1 *Wiel, Water Rights*, Secs. 89 and 90, p. 97 *et seq.* and cases cited), it was realized that the underlying legal title was outstanding. The courts in the cases involving these rights were careful to refer to the paramount Government title. They usually did so by saying that the rights on which they were passing were good "except as against the United States." (*Wiel, Water Rights*, Sec. 91 p. 102 and cases cited; *Atchison* v. *Peterson*, 20 Wall. 507, 510; *Basey* v. *Gallagher*, 20 Wall. 670, 681; and *Sturr* v. *Beck*, 133 U. S. 541, 552).

The uppermost question in everyone's mind was what Congress would do and what effect whatever action Congress might take would have upon these rights. When Congress provided a means for the acquisition of the Government title, would the Government grant of mineral land cut off the right of the miner whose vein ran under that land from following it and abstracting the minerals? Would a grant of land, over which a ditch or flume or road ran, except a right of way for the benefit of the original builder and present occupier, and would a grant of riparian land or of all the riparian land on a stream carry with it the right to stop the use of water by appropriators who had taken it, often to a great distance, and put it to nonriparian uses? To meet this situation the act of 1866 and the supplementary act of 1870 were passed.

Congress had already provided adequate means for the acquisition of the Government title to agricultural lands by passing the homestead act in 1862.

(b) These acts of 1866 and 1870 examined—their interpretation by the courts.

The relation of these two acts to water rights and water ways was precisely the same as their relation to the mineral lands. The first act, July 26, 1866 (14 Stat. 251), was styled merely, "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes;" but it was in reality the first general mining law of the United States. Its first section declared that "the mineral lands *of the public domain*" should be free and open to exploration and occupation by citizens, etc., subject to such regulations as may be prescribed by law and subject also to the local customs or rules of miners in the several mining districts, *so far as the same may not be in conflict with the laws of the United States.*

Sections 2 to 4 provided for the locating, entering, and patenting of lode claims occupied and improved "according to the local custom or rules of miners" in the mining district "so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners," giving them the right to follow the vein or lode to any depth "although it may enter the land adjoining, which land shall be held subject to this condition" (sec. 2), authorizing

the Surveyor General to vary the form from rectangular "to suit the circumstances of the country and the local rules, laws, and customs of miners," with a proviso that no location should exceed a certain length for each locator (sec. 4).

Section 5 provided:

> That as a further condition of sale, *in the absence of necessary legislation by Congress*, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Section 8:

> That the right of way for the construction of highways over public lands, *not reserved for public uses*, is hereby granted.

In section 9 we find substantially and almost in words R. S. section 2339. It was as follows:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the con-

> struction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Section 10 allowed settlers on nonmineral lands, which had been excluded from survey as mineral, to acquire them under the preemption and homestead laws.

The act of July 9, 1870 (16 Stat., 217), amended the act of 1866 by adding six new sections numbered 12 to 17, inclusive. Section 12 extended the law, with certain modifications, to placer claims. Section 13 provided that where claims had been held and worked "for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated", the right to patent should be deemed established. Sections 14 to 16 dealt with land office procedure, fees, and surveys. Finally, section 17, which has been modified into R. S. section 2340, *supra*, declared:

> That none of the rights conferred by sections five, eight and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all *public lands* affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, *as may have been acquired under* or recognized by the ninth section of the act of which this act is amendatory.

The sections 5, 8, and 9 here referred to are the section allowing local legislatures, in the absence of legislation by Congress, to provide rules "for working mines involving easements, drainage, and other necessary means to their complete development," the section granting rights of way over public lands for highways, and the section concerning water rights and ditches. (R. S. 2339.)

The mining features of this act were crude and were repealed and their place taken by the more detailed act of May 10, 1872. (17 Stat. 91.)

In this latter act, however, the policy adopted by the former of favoring local laws and granting mining rights in accordance therewith is adhered to. The water features of the original acts have been preserved and are still in force.

That the act of 1866 provides a means for the future acquisition of rights, water as well as mining, is the settled holding of the courts. That it looks to the future as well as the past is made perfectly clear by the act of 1870 through the use of the words: "Such water rights * * * as may have been *acquired under* or recognized by the ninth section of the act of which this is amendatory." Two classes of rights are under consideration and provided for; rights existing prior to the passage of the act and rights acquired afterwards and so under the express authority of the act itself.

Jacob v. *Lorenz*, 98 Calif. 332, 335.
Beaver Brook v. *St. Vrain*, 6 Colo. App. 130, 138.
1 Wiel, Water Rights, 3d Ed., Sec. 99, p. 116.
Long, Irrigation, 2nd Ed. Sec. 74, p. 134.

Without unduly extending this analysis or resorting to too extensive citations of authority, we wish to invite still further attention to certain of the salient features of this legislation and its interpretation, as it is, in our view, the foundation of all water rights in the Western States to-day and provides a solution and, we think, the only solution of the problem of interstate streams.

It will be seen that this act of 1866, while treating principally of mining, governs also water rights and rights of way for ditches, canals, and highways. These several subjects are handled together and in the same way. As to each the act gives the fundamental title to those who already had possessory rights, and provides a way by which grants of mining and water rights may be obtained in the future. Mineral lands are held open to "exploration and occupation", and he who occupies is given the right to take the other steps which lead to a grant. Water rights are "protected and preserved" to whomever has "possessed" them. Local laws, rules, and customs are used in both cases to define the right and provide the course that must be followed to acquire it. The mineralized vein is recognized by the act, as it was before by the customs of the miners, as being the thing appropriated, and so the right is given to follow it regardless of the surface limits of the claim extending vertically downward, which ordinarily define the extent of land holdings. In the field of water rights, again in accordance with local customs, the one who first "appropriates,"

even for use on nonriparian lands, is given the better right. Both as to mining and water, however, the rights granted are only such as any proprietor of the whole property involved could grant, and the rule of priority is only that which necessarily follows from successive conveyances of defined parts of a whole.

Further, it should be observed that under this act the proprietor, the United States, in a way holds its landed estate for conveyance in three classes—mineral rights, water rights, and what may be called, for convenience, ordinary land rights. It holds all of these rights for conveyance separately or together, as the case may be. Consequently, riparian rights pass or not under a patent of riparian land, generally speaking, according to whether or not the riparian doctrine or the appropriation doctrine is the rule in the locality where the land is situated. Congress has provided that it shall be otherwise in the Black Hills Forest Reserve in South Dakota (34 Stat. 233, 234). As to this point, we shall speak more in detail when we come to consider the Mexican grants and the cases, holding that in the pure appropriation States the Government's patent does not carry riparian rights.

It is well understood that the local rules, whether found in miners' customs, court decisions, or legislative acts, were adopted merely to supplement the particular provisions and fundamental conditions of the act, in order to fit it to local conditions, including local preferences, and avoid unnecessary complexity and volume in the act itself. This plan of adopting

local laws or rules as the laws and rules of Congress is familiar enough. It is seen in the legislation defining crimes on reservations under exclusive jurisdiction of the General Government; in the conformity provisions governing the Federal courts in common-law cases; in various laws for the taking of affidavits, etc. Illustrations might be greatly multiplied.

As we have already said, the local laws, customs, etc., in respect of mining claims, retain their function under the mining law as it is to-day. They depend, of course, upon the express permission of Congress therein contained.

> State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation.
>
> *Lindley on Mines* (2d ed.), sec. 249.

Quoted with approval in *Butte City Water Co.* v. *Baker*, 196 U. S. 125.

Their constitutionality, challenged in the case last cited, was upheld upon the ground that a delegation of authority to adopt "minor and subordinate regulations" concerning the disposition of the public domain is not a delegation of strictly legislative power. See also *Clason* v. *Matko*, 223 U. S. 646, 654.

It is somewhat astonishing to find the *Broder* case (101 U. S. 274) and *Jennison* v. *Kirk* (98 U. S. 453, 456) cited in Colorado's brief as authority for the

idea that the act of 1866 recognized an independent title or power in the States. They hold exactly the reverse.

The act is a grant of rights belonging to the United States. This Court in *Broder* v. *Water Co.*, *supra*, 101 U. S. 274, 275, construing the right of way part of the ninth section of the act says that the same is an "unequivocal grant." The Circuit Court for the District of Nevada in *Union Co.* v. *Ferris*, 2 Sawy. 176, 184, held:

> The policy of this enactment (sec. 9, act of 1866), so far at least as it relates to agricultural districts, may be doubtful; but it is the law of the land, and the courts must carry out what appears to be the intention of the legislature (Congress) as therein expressed. And that, as indicated by the act, appears to be to grant to the owner of possessory rights to use the water under local customs, laws, and decisions, the absolute right to such use, which the Government alone could grant.

The text writers so construe it. (See: *1 Wiel, Water Rights*, 3d Ed. Sec. 97, p. 113; Sec. 155, p. 177 *et seq.*; *Long, Irrigation*, 2d Ed., Sec. 74, p. 134.)

The grant is made directly to the individual appropriator. It takes effect upon his bringing himself within its terms by complying with the local laws. No patent follows as in the case of mining claims, but the title passes by virtue of the statute itself and compliance with it, as is the case with railroad grants and grants of rights of way.

> The language of this act (act of 1866) makes the right a confirmation *in praesenti* as to the

> claims included (referring to water rights), without any preliminary proceeding to obtain a title, as in the case of a mining claim. A grant conferred by an act of Congress is the highest source of title known to our laws.
>
> *Yale, Mining and Water Rights*, p. 380.

The law of water rights in California and the numerous States which have followed her lead is based squarely upon the Federal title. These States are California, Kansas, Montana, North Dakota, South Dakota, Washington, Nebraska, Oregon, and possibly Oklahoma. (1 *Wiel, Water Rights*, 3rd Ed., p. 226.) Appropriation rights in those States are explicitly held to be derived from the United States by direct grant under this act. Riparian rights, which there exist side by side with rights by appropriation, are held by the courts to be derived from the United States under grants by it of riparian lands.

> It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress (1866) granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in

previous appropriations made with its presumed sanction and approval.

Lux v. *Haggin*, 69 Cal. 255, 339.

An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be a part of the public domain, is a licensee of the general government; but when such a part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his (water) rights against this land under an express grant.

Smith v. *Hawkins*, 110 Cal. 122, 125.

The Supreme Court of Washington, referring to this act, said:

It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the ninth section of the act of Congress of July 26, 1866, the substance of which is included in section 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and, indeed, to every one, that neither local customs nor State laws or decisions of State courts could vest the title to public land or water in private individuals without the sanction of the owner, viz., the United States.

Benton v. *Johncox*, 17 Wash. 277.

In Oregon it is held that "an appropriation of water is a grant by the General Government to the

settler of the right to its use." *Morgan* v. *Shaw*, 47 Oreg., 333, 337.

> A water right can, therefore, be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and use of the water on the public domain is founded in grant from the United States Government as the owner of the land and water. Such grant has been made by Congress.
>
> *Smith* v. *Denniff*, 24 Mont., 20, 21.

See also *Barkley* v. *Tieleke*, 2 Mont., 59, 64.

To the same effect see:

> *Cruse* v. *McCauley*, 96 Fed. 369, 373–374.
> *Howell* v. *Johnson*, 89 Fed. 556, 558.

Colorado and the other pure appropriation States, and the Territory of Alaska (Alaska, Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming; 1 Wiel, Water Rights, 3d ed., p. 226), endeavor to find some basis for water rights other than the Federal title. The arguments advanced for their position we shall examine under a different head. In those States water rights are identical with appropriation rights in California and the other dual system States, and, of course, are derived, as they are there, from the United States by grants under this act, unless indeed the effectiveness of that legislation, so far as it covers water, came to an end upon the admission of the States, a proposition which it is in part the purpose of this brief to refute.

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(3) Subsequent acts of Congress contradict the theory that the Federal ownership has been abdicated.

Since the act of 1866 there are a number of statutes reiterating the policy of Congress to permit the appropriation of water and leave it largely within the control of the local regulations. These laws do not bear out the assertion that the Federal interest in nonnavigable water has been transferred to the States, and still less do they lend support to the theory advanced in Colorado's brief that Congress recognizes the States as having any ownership of or control over such water independent of a transfer from the Federal Government.

It is to be noticed that in these later declarations by Congress concerning water there is evident not only a consciousness of the power to deal with this subject without State intervention, but in some instances an actual exercise of the power itself. It is as impossible to gather from these acts that Congress intended by them to divest the United States of its interest in water as it is to obtain the impression that Congress in legislating believed it was without power in the matter. All of these acts merely adhere to the general principle of the act of 1866 as one of convenience. They favor the laws of the Territories quite as much as those of the States and in some instances they give rules independent of either. On this subject see the discussion and citations in *Kinney on Irrigation and Water Rights* (2d ed.) Sec. 637.

The desert-land law of March 3, 1877 (19 Stat. 377), contains this proviso:

> *Provided, however*, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

It has been suggested that this is an irrevocable "dedication" to the States, but a glance at the whole provision will convince one that it will not bear such a construction. The proviso makes no mention of the States and does not even refer to the local laws and customs. Congress itself undertakes to lay down the essential conditions of the water right which the desert entryman may acquire: It "shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation," and the free right of appropriation is made coextensive with the public lands in the States and Territories named. The claimed dedication to the States is no more than a declaration that it was

not intended by the act to withhold from free appropriation and use by the public (as theretofore under the act of 1866) for "irrigation, mining and manufacturing purposes," surplus water over and above such actual appropriation and use, under the act, and over and above that already held by virtue of "existing rights." The declaration is similar to that in the mining law of 1872 (17 Stat., 91): "All available mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to purchase, and the lands in which they are found, to occupation and purchase * * * ."

In both instances Congress states its present policy and leaves itself free to change it at will. The language of the desert land law is that of a proprietor dealing with its own property.

The case of *Hough* v. *Porter*, 51 Oreg. 318, is sometimes cited as sustaining the theory that this act is a dedication of water to the States. The learned and exhaustive opinion of Mr. Justice King finally sustains, and, indeed, depends throughout, upon the proposition that the United States, as the owner of the public domain, is quite competent to dispose of the waters thereon together with the land, or to dispose of each separately, or to dispose of one and retain the other. The question examined was whether various owners who had obtained patents for riparian lands from the United States *after* the desert land law became effective had thus acquired

full riparian rights in the waters, no reservation in that regard being expressed in the patents. The court holds that such rights (except for domestic and other purposes not named in the act) were withheld from disposition with the land by reason of this declaration of the desert land law, which the opinion in some places treats as amounting to a reservation by the Government and in others as a dedication by the Government to "the public." To hold that there was actually a dedication and that the Government had thus at one stroke parted with all its interest in the unappropriated waters was quite unnecessary to the decision; for, obviously, if the intent of the declaration was, as it may well have been (*Williams* v. *Altnow*, 51 Ore. 275; *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690; *Gutierres* v. *Land Co.*, 188 U. S. 545), to set the waters apart from the land for acquisition by appropriation only, subsequent land patents would not operate to give riparian rights, whatever might be their terms as drafted in the department.

See 1 *Kinney, Irrigation*, pp. 1091, 1095.

It is this idea of the severance of the water from the land by Congress (see *Wiel, Water Rights*, p. 222) and the withholding of it for appropriation, we take it, that was said to be plausible in the reference to *Hough* v. *Porter* in *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344. The reference is as follows:

> The opinion that we have expressed makes it unnecessary to decide whether lands in

> the arid regions patented after the act of March 3, 1877, c. 107, 19 Stat. 377, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act construed with Rev. Stat. Sec. 2339. The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds.

Wholesale dedications by the Federal Government to the States are not to be implied or found in words perfectly consistent with a different intention. *United States* v. *Oregon & C. R. Co.*, 186 Fed. 861, 893; *Oregon Railway* v. *Oregonian Railway Co.*, 130 U. S. 1, 26; *Slidell* v. *Grandjean*, 111 U. S. 412, 437.

It should be noticed further that in this proviso Congress was careful to confine its legislation to water "*upon the public lands*" and "*not navigable*," showing that it fully realized the distinction the law makes between public and private waters and that the relation of the United States to innavigable waters is that of a proprietor.

The clause in the Timber and Stone Act of June 3, 1878 (20 Stat. 89), as follows:

> That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water

> rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act,

protects the water rights and rights of way "conferred by" the act of 1866 and declares that all patents shall be subject to such rights "acquired under and by the provisions of said act." This is a clear recognition that the source of water rights is the United States, and is very far from giving support to the idea that such rights are the issue of a State law, or that the power to grant them has been devolved to the States. It also shows that Congress had clearly in mind that "vested and accrued" water rights in the public-land States become such by virtue of the act of 1866 with the act of 1870, some of the language of which is used in this later legislation.

The act of March 3, 1891 (26 Stat. 1095, sec. 18), granting rights of way for irrigation purposes, declares that the privilege granted shall not be construed to interfere "with the control of water for irrigation and other purposes under authority of the respective States *or Territories*." This means the authority to control the appropriation of water on the public lands conferred by the act of 1866. The territories are put on the same plane with the States.

Colorado's brief on rehearing (vol. 1, p. 122) points out that the act of August 18, 1894 (28 Stat. 422), known as the Carey Act, grants to public-land States each a million acres of land or so much as the State

may cause to be irrigated, reclaimed, and occupied. We do not see what bearing the fact that under the act the State is to cause the lands to be irrigated has upon the questions here. The State receives the grant upon condition that it will reclaim the land in the manner provided by the act. It is required to cause it to be irrigated, reclaimed, occupied, and not less than 20 acres of each 160-acre tract cultivated by actual settlers "as thoroughly as is required of citizens who may enter under the said desert-land law."

The forest-reserve legislation of June 4, 1897 (30 Stat. 11, 34), contains a clause which provides that—

> All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Here the uses of water intended to be allowed are such as may be practiced consistently with the objects of the reservation and by ways authorized by Congress. This provision concerning their use is merely a modified reiteration of the consistent policy of Congress, to which we have already given some attention, to leave the matter of defining and controlling the uses of water as far as possible to the local laws.

There were persons "residing within the boundaries of such reservation" owning "property or

homes" there. Others were permitted to enter for "proper and lawful purposes," including mining and milling, if they complied with the rules and regulations. *United States* v. *Grimaud*, 220 U. S. 506. The situation called for the use of water, and the object of the provision under discussion was to recognize the legitimacy of the use for the purposes specified, if consistent with the laws of the State or other laws of the United States.

An act approved February 26, 1897 (29 Stat. 599) opened to use reservoir sites which had been reserved by the General Government, with the proviso that *charges* for the water should be "subject to the control and regulation of the respective States and Territories," etc.

On March 2, 1897, Congress passed a special act (29 Stat. 603) restoring to the public domain a reservoir site, theretofore reserved, and authorizing the Secretary of the Interior to sell it to whomever might buy it for the building and maintaining of a reservoir there. It contained a proviso that the act should not be construed to "deprive the State of Colorado of the control of the water in any reservoir which may be constructed on this site by any person or corporation or association, under the regulations provided by the State laws in such cases."

Under the first of these acts Congress rates the Territories and the States on a par and makes it clear that the reservoir owner will not be allowed to fix charges for the water he stores upon any claim that State and Territorial laws respecting such matters

do not affect him. The second act preserves to the State of Colorado the regulative control of the water that may be stored in the reservoir. This act is quoted in Colorado's brief, Vol. 1, p. 122, but how it can be considered a recognition of the State's inherent or acquired ownership of innavigable waters, we do not see.

The reclamation act of June 17, 1902 (32 Stat. 388) inaugurates a new policy by which the United States itself undertakes the development of its land and water resources in the arid States, although development by private enterprise or by State action (under the Carey Act, 28 Stat. 422) is not excluded. Consequently the right of appropriators under the act of 1866, through the subordinate instrumentality of of State laws, is carefully preserved. Money received from the sale of public lands is devoted to "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands." Apart from any consideration of whether this policy would have been adopted if Congress had believed that the waters, indispensably necessary to make these undertakings a success, belonged to the States and so were subject to withdrawal by them at any time, the act shows that the water is assumed to be subject to the use and disposition of the Government. In section 5 it is provided that—

> No right to the use of water for land in private ownership shall be *sold* for a tract exceeding one hundred and sixty acres to

> any one landowner, and no such *sale* shall be made to any landowner unless he be an actual *bona fide* resident on such land * * * and no such right shall permanently attach until all payments therefor are made.

As rights by appropriation become vested only by beneficial use, it would seem from this that it was not thought that the Government, by undertaking these projects, would become merely a public ditch owner with no vested right in the water which the ditches would carry.

Section 8 is as follows:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

The first part of this section is simply a recognition of vested rights acquired under the act of 1866, and

a preservation of the existing systems of water law in the States and *territories* which have grown up under that act. (See *Gutierres* v. *Albuquerque*, *infra*, 188 U. S. 545, 552–554.) The direction of the Secretary of the Interior to "proceed in conformity with such laws," is meant like the conformity provisions in other Federal statutes to harmonize Federal activity with that which must, by compulsion of State law, go forward, if at all, under local procedure, deriving its authority from the Federal act of 1866. The concluding clause is significant: "That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Here again, we see that the State and territorial laws are rated on a par and that Congress itself undertakes to create water rights and define them. A water right acquired by appropriation and beneficial use in irrigation is not usually appurtenant to the land irrigated. 1 *Wiel on Water rights* (3d ed.) sec. 550.

Colorado's brief (Vol. 1, p. 119 et seq.) cites the acts that we have been discussing, with the exception of those of May 10, 1872, June 3, 1878, and June 4, 1897, as showing that Congress in them has recognized and affirmed the proposition laid down in the brief that the States have full, and as we understand the brief, the same soverign jurisdiction and control over all waters within their borders, innavigable as well as navigable. The distinction which the law makes between these two classes of waters is not

discussed there or elsewhere in the brief, and no attempt is made to point out how these Federal statutes recognize any such doctrine or are in any way inconsistent with Federal proprietary ownership of the innavigable waters.

In concluding this topic we observe that the legislation of Congress with regard to water rights all centers upon and is intended to preserve the policy adopted in the act of 1866 of granting the right to use the unreserved proprietary waters of the United States to individuals in accordance with local systems of water-right law.

The right-of-way parts of the act of 1866 under which appropriators of ways were granted easements over the public lands without formal action or coming into contact with Federal executive officers, have for the most part, given way to a more exact system created by the acts of 1891 (26 Stat., 1095) and 1901 (31 Stat., 790) considered by this court in the late case of *Utah Power & Light Co.* v. *United States*, 243 U. S., 389. These later laws in general adopted a plan for granting permits or licenses under executive regulation instead of easements without regulation, and substituted direct dealing between the Federal Government and the grantee for the loose indirect process permitted by the act of 1866.

Had such a plan been adopted as to water rights, or had patents for these rights been given as in the case of mining rights, is it likely that the proprietary right of the Government to the waters would ever

have been questioned, or at any rate, questioned at a later period or more persistently than was its title to the public lands? It is the long continuance of subordinate State control under a system that involves no recourse to the source of power, that has caused the fact that such control is subordinate, sometimes to be lost sight of.

(4) Grants of riparian lands in the pure appropriation States do not carry riparian water rights. The decisions to this effect are in keeping with the act of 1866, the public land policy of this country preceding that act, the same policy of Mexico, and with the rule of convenience adopted by this court by which the incidents of title taken by grantees of the Government are to be determined by the local law in the absence of congressional legislation to the contrary.

In Colorado and the other States that have not followed California's lead in retaining the riparian system, the cases hold that a grant of land from the Federal Government does not carry with it riparian rights.

Coffin v. *Left Hand Ditch Co.*, 6 Colo., 443, 448.

Clark v. *Ashley*, 34 Colo., 285.

Similarly this court has held that Mexican grants in Arizona and New Mexico did not carry water rights.

Boquillas v. *Curtis*, 213 U. S., 339.

Gutierres v. *Albuquerque Co.*, 188 U. S., 545.

The act of 1866, with the act of 1870, as we have said, protected water rights that had "vested and accrued" by "priority of possession" according to the "local customs, laws, and decisions of courts." It also provided the same means of acquiring such rights in the future. Undoubtedly the appropriation rights that had grown up in California and elsewhere in the West were the rights that were chiefly in the legislative mind at the time, because it was those rights that were the subject of controversy. Equally, without doubt, the predominant thought of Congress was to support the existing local customs and also to give the States and Territories all reasonable freedom to make their own rules in the future. The act itself speaks to that point, and the subsequent legislation that we have just been considering shows reflexively that Congress intended to favor the local law, future as well as present.

If the local law recognized riparian rights, as well as appropriation rights, the riparian owner would under that law have possession of such rights as an incident of his title to the land, and so would have that "priority of possession" which the act of Congress intended to support. If, on the other hand, the local law only recognized appropriation rights, the owner of riparian land as such would not have possession of a right to the use of water, and so would take no water right under the act of Congress nor by virtue of the Government's patent of the land.

In view of this act of 1866, it could not have been the intent of Congress to grant riparian rights with its lands when the local law recognized only appropriation rights. The construction of such a grant in the sovereign's favor and in accordance with its will, which the law requires, would not give to the grantee rights not recognized by the local law. In *Sturr* v. *Beck*, 133 U. S. 541, decided in 1890, the question was as to the right of a homesteader of riparian land, who had made no use of the water, as against a subsequent appropriator of water from the stream. The case arose in Dakota, a dual system territory. The opinion by Mr. Chief Justice Fuller treated the homesteader, Smith, as "a prior appropriator" and as having "priority of possession" under the act of 1866. The opinion (p. 552) says:

> Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his *lawful occupancy under settlement and entry* was not *a prior appropriation* which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the supreme court to that effect.

With less foundation it is held that the appropriator who made use of water according to the local customs before the act of 1866 has a right good

against a subsequent grantee of riparian land who also obtained his rights before that act.

> 1 *Wiel, Water Rights*, 3d Ed., Sec. 89, p. 97, and the court decisions there cited and discussed.

Here the act could do no more than throw a reflexive light upon the intent of the Government in granting the land. The controversy in the West, where possessory rights of enormous value had grown up prior to the act of 1866, was about this point, and the local courts and this court finally held, as to rights of way (*Broder* v. *Water Co.*, 101 U. S. 274), and the State courts have held as to water rights, that these possessory rights were not to be disturbed by the subsequent grant of the Government.

> *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 446, 449.
> *Lux* v. *Haggin*, 69 Calif. 255.
> *Conger* v. *Weaver*, 6 Calif. 548.
> *Merritt* v. *Judd*, 14 Calif. 59, 64.

To preserve such rights this court has frequently said that the act of 1866 as to them was "more the recognition of a preexisting right than the creation of a new one."

> *Broder* v. *Water Co.*, *supra*.
> *Atchison* v. *Peterson*, 20 Wall. 507.
> *Basey* v. *Gallagher*, 20 Wall. 670.
> *Jennison* v. *Kirk*, 98 U. S. 453.

In speaking of these decisions, Mr. *Wiel* (*Water Rights*, pp. 115–116) says that the possessory rights

the public domain "as to mines and rights of way ... ers" are in the nature of fictitious grants deduced from the silence of Congress; that the act of 1866 ... legitimacy to this local custom, and that "this legislation related back to its birth and continued for the future." Says he: "It is a clear case where the law was evolved from the exigencies of the times, molded by circumstances pressing it now one way, then the other; the growth of two wars and the winning of desert and wilderness and the peopling of a continent, more potent than closeted logic."

Regardless of whether the position taken by the courts was strictly logical, the possessory rights were upheld, and the fact that they were does not militate against the original ownership of all these rights by the United States or against the present ownership of all other similar rights. The argument that it does, ... the case of water, is confronted by the fact that rights of way were equally protected, and no one would claim that the United States does not own the public land.

These cases, as far as water rights go, are in complete harmony with the rule of convenience adopted by this court under which rights in the beds of meandered innavigable streams and lakes pass or not under the Government patent in accordance with the local laws; all, of course, in the absence of legislation by Congress to the contrary.

Hardin v. *Shedd*, 190 U. S. 508.

We discuss the case just cited more fully below ... tent ourselves with pointing out here that it

fully recognizes the ownership by the United States of the beds of such waters and, by implication, of the right to the waters themselves and the full power of Congress to grant these rights if it sees fit. The doctrine of *Hardin* v. *Shedd* was applied by this court to riparian water rights in the late case of *Los Angeles Farming and M. Co.* v. *Los Angeles*, 217 U. S. 217, 233.

In *Gutierres* v. *Albuquerque Land Co.*, *supra* (188 U. S. 545), one of the contentions against the right of an appropriator to make surveys for the construction of a ditch, was that the water to be carried thereby belonged to the plaintiff as the owner of lands riparian to the stream. This court, speaking by Mr. Justice White, held that such ownership was immaterial, because for one reason it was conceded that by the laws of Mexico, in force when the Territory of New Mexico, in which the lands lay, was ceded to the United States, the use of water was not limited to riparian lands. The case thus in effect holds that a Mexican grant of lands in New Mexico did not carry riparian rights. In that case, also, the point was urged that the waters in New Mexico belonged to the United States, and that therefore certain territorial legislation permitting their appropriation was invalid as an interference with Federal property. The decision of the case was put upon the ground that the local laws did not recognize riparian rights, and is in full accord with the theory of Federal ownership of water.

Although the riparian doctrine was the general law of Mexico (*Lux* v. *Haggin*, 69 Calif. 255, 313; *I Wiel Water Rights*, 3d Ed., sec. 68; *1 Kinney, Irrigation*, 2d ed., sec. 577 et seq.), riparian rights were, it seems, not recognized in the State of Sonora. (*Boquillas* v. *Curtis*, 213 U. S. 339, 343.) The situation in Mexico was analogous to that in the territory ceded by Mexico to the United States when this country first obtained jurisdiction. (See 1 *Wiel, Water Rights*, 3d Ed. pp. 68, 966.) The water rights were the property of the owner of the public domain which was Mexico, and the lands were practically all public. The few settlers that were in Sonora had merely possessory rights on the public domain. They made use of the water just as the early California miners did, and their rights or claims were protected, not against an assertion of right by Mexico, but against an assertion by the grantee of riparian land, taking his title from Mexico. All water rights that were not granted by Mexico, being property, passed by the cession of the territory to the United States and were taken by the United States under its own law.

This court, in the case we have just been considering, while holding that riparian rights so far as the owners of Mexican grants were concerned, did not exist in New Mexico, was careful to point out that the New Mexico statute cited by the plaintiff was "not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States" and to say "O course. as held in the Rio Grande case (p. 703)

[*United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, referred to in the beginning of our argument], even a State, as respects streams within its borders, in the absence of specific authority from Congress, 'can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property.' "

Similarly in *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, this court refused to protect a Mexican land grant on the San Pedro River in Arizona from a diversion of water from a stream to which that grant was riparian. The decision goes upon the ground that in Sonora, when the grant was made, the riparian system did not prevail, but appropriations were permitted, consequently the Mexican grant did not carry riparian rights.

Whenever Congress desires that the local law shall not govern in construing water rights in connection with its grants of lands, of course, it can so provide (*Hardin* v. *Shedd*, *supra*) and it has done so in at least one case. In South Dakota the riparian system obtains. There Congress has provided by statute (act of June 11, 1906, 34 Stat. 233, 234) that in the Black Hills Forest Reserve water may be appropriated, and specifically that the Government patent of riparian land shall not carry water rights. We shall refer more fully to this statute under the next heading.

(5) Hardin v. Shedd and other cases holding that the Government's grantee of lands bordering meandered innavigable waters takes the submerged land or not according to the local law, support the Government's title to both land and water. That the rule is merely one of convenience in interpreting the Government's grant, and that it is competent for Congress to change it, is well settled.

Colorado's brief cites these cases as supporting its theory of State ownership of innavigable waters. That the cases preceding *Hardin* v. *Shedd*, 190 U. S. 508, should not be taken as giving any support to the idea that this court recognized an ownership in the States, of the beds of innavigable waters, was made perfectly clear in the latter case. The opinion, by Mr. Justice Holmes, points out that "when land is conveyed by the United States bounded on a nonnavigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water." "In the latter case," he says, "the land under the water does not belong to the United States, but has passed to the State by its admission to the Union." He then says that "when land under navigable water passes to the riparian proprietor along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore."

"The rule," he goes on to say, "as to conveyances bounded on nonnavigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the swamp-land act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant." Then significantly, the opinion says: "We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point." A dissenting opinion was written in that case by Mr. Justice White, with whom concurred Mr. Justice McKenna. The difference between the majority and the minority of the court was not, however, as to the ownership of the land or the water. Both agreed that that was in the United States.

The same question was before this court in *Kean* v. *Calumet Canal & I. Co.* (190 U. S. 452), which was decided prior to *Hardin* v. *Shedd*. In that case there was the same divergence of opinion in the court upon the question as to whether this rule of convenience should be further upheld. The majority opinion there, also delivered by Mr. Justice Holmes, said: "It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not a new one. For twelve years the decisions in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases

may have shown. Meantime many titles must have passed on the faith of those decisions. *The United States can meet them by the form of its conveyances.* It seems to us that it would be likely to do more harm than good to allow them to be called in question now."

In the dissenting opinion, which was upon the point of the wisdom of changing the rule, Mr. Justice White, with whom concurred Mr. Justice McKenna, referred to the act of 1866, the desert-land act of 1877, the right-of-way act of 1891, and the reclamation act of 1902, and also cited *Gutierres* v. *Albuquerque* and *United States* v. *Rio Grande Dam & Irrigation Co.*, as showing that the laws of the United States alone should be considered in determining questions which have arisen under them with respect to grants by the United States of its property. Mr. Justice White, referring to these statutes, said: "Besides the implication resulting from the general legislation of Congress concerning the sale and disposition of the public domain, *the special statutes granting rights in, and regulating the use of, the nonnavigable waters upon the public lands are very conclusive.*" (P. 484.)

In a later case, *Scott* v. *Lattig*, 227 U. S. 229, 244, this court adhered to the rule that the State law should govern as one of convenience, and the opinion delivered by Mr. Justice Van Devanter quotes the passage in *Hardin* v. *Shedd*, where the distinction between grants of lands bordering navigable and innavigable waters is made.

It, therefore, is the settled law that the United States owns the lands under innavigable bodies of water on the public domain, and that Congress may, if it sees fit, grant those lands in any way that it thinks proper, and may provide a rule for its grants of land bordering on such water, contrary to that of the State in which the lands lie.

Each of the three propositions which we have just stated as being settled law with regard to the shores and beds of innavigable waters is, we submit, equally the law as to the waters themselves. It must be the law as to the waters on the public lands in Colorado as well as to the waters on such lands in Illinois.

If these waters belong to the United States, as we contend they do, Congress has exclusive power over them, and it is inconceivable that any State law by virtue of its own force can determine how Congress shall grant them, or to what extent the grant of Congress shall be effective.

Wilcox v. *Jackson*, 13 Pet. 526, 537;
Gibson v. *Chouteau*, 13 Wall. 92;
Irvine v. *Marshall*, 20 How. 558, 561, 563.

Any other rule would take from Congress the disposing power over the property of the United States and put that power in the States. State sovereignty stops when it reaches the Federal property. See the cases just cited and also *Light* v. *United States*, 220 U. S. 523, 536, 537;

United States v. *Midwest Oil Co.*, 236 U. S. 459, 474;
Camfield v. *United States*, 167 U. S. 518, 526.

That Congress has, at least in one instance, exercised its right with regard to the waters themselves to provide that grants of the United States shall not be construed in accordance with the local law, is shown by the forest reserve act of June 11, 1906, 34 Stat., 233, 234, already referred to. Section 3 of that act is as follows:

> That all entries under this act on the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States and the law and regulations permitting the location, appropriation, and use of the waters within said forest reserves for mining, irrigation, and other purposes; and no title acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

As South Dakota is a State holding to the riparian doctrine, the patents of the United States, both under the act of 1866 and the rule of convenience, would carry with them riparian rights. Here, Congress says that it shall be otherwise and provides for the vesting of water rights in accordance with its own laws covering appropriations upon forest reserves.

(6) The claim made by the pure appropriation States, that the States own innavigable waters, was originally an outgrowth of the controversy about the protection of possessory rights before the act of 1866. It is now but an expression of opposition to the constitutional provision vesting the disposal of the property of the United States in Congress. Arguments for State ownership or control examined.

The claim of State ownership of innavigable waters was an aftermath of the bitter controversy that at one time existed about the protection of possessory rights that had grown up on the public domain after the discovery of gold and prior to the act of 1866. The fear during that period was that Congress might not provide any means for the protection of those rights and that they could not be upheld as against grants of land by the Federal Government. In the West, the principal thought of that day was that some means must be found for upholding those rights and thereby protecting existing conditions and what had been built up upon them.

Only three States were admitted before 1866—California, Oregon, and Nevada. When the appropriation States came to be admitted the controversy about possessory rights was still fresh in mind and although Congress had settled the matter in favor of those rights by the passage of the act of 1866 and had provided for the acquiring of the same sort of rights in the future, the controversy had been so bitter and the fear that those rights would not be

protected had been so great that some of the new States took the position that innavigable waters did not belong to any landowner, the United States included. They put provisions in their constitutions asserting that such waters belonged to the people. (*Wiel, Water Rights*, p. 96.)

The primary desire was to protect these so-called vested possessory rights, and it was thought that that could not be done without abrogating the common-law system of riparian rights. (See *Coffin* v. *Left Hand Ditch Co.*, 6 Colo., pp. 443, 446). Since then, various arguments have been made to support the claim of right in the States as against the Federal Government. An analysis of the positions taken by those who attempt to uphold the right of the States shows that it is now simply one of opposition to the constitutional provision which puts the disposal of the public domain and other property of the United States in Congress and therefore wholly removes such property from State control. The arguments that are usually made are, stating them briefly, (*a*) that the United States, by permitting the States to assert ownership of water in their constitutions and by ratifying those constitutions, has transferred its interest in the water to the States; (*b*) that the needs of these States, on account of their being situated in the arid region, demand the substitution of the appropriation for the riparian system and that this involves a denial of the Federal title; (*c*) and that flowing waters, because of their nature, are, like animals, *ferae naturae*, under the control of the

municipal sovereign, and so rights in such waters are under the same control.

Colorado's brief seems to argue also that, because the States have control of navigable waters, subject to the control of Congress over navigation, they also have control of innavigable waters.

(a) Ratification of State constitutions asserting State ownership of waters does not divest the United States of its property rights therein.

The provisions of the constitution of Colorado may be taken as fairly representative of those contained in the constitutions of the other States having provisions asserting ownership of water, and are as follows:

> The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as herein provided.
>
> Colo. Constitution, Art. XVI, sec. 5.
>
> The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over

those using the same for manufacturing purposes.

Colo. Constitution, Art. XVI, sec. 6.

The contention is that it was the duty of Congress when creating the States to see to it that their constitutions asserted no ownership in, and assumed no control over, property of the United States which it was not the intention of Congress to convey to the States; and that if those constitutions when finally adopted contained provisions of that character they must be taken as effective congressional grants of such property to the States.

Considering the purpose to be accomplished and the part that Congress plays in creating a State, this seems an astonishing position to take. What Congress does is to bring into being a new State sovereignty to take its place with the others already existing. Its purpose is the creation of a State. It is true that by the act accomplishing that purpose it has been the invariable custom of Congress also to make specific grants of land and sometimes it makes grants of other property to the new State, but such granted property passes by virtue of the act of Congress, which is complete in itself, and not because of anything contained in the constitution adopted by the State. In those grants, also, things not enumerated are excluded by implication.

The constitution which the State adopts is not a contract between the United States and the State regarding property rights, but the fundamental instrument of the new State's polity.

The Supreme Court of Colorado quotes Mr. Cooley and says, concerning the constitution of a State:

> It is not the beginning of a community nor the origin of private rights. It is not the fountain of law nor the incipient state of government. * * * It grants no rights to the people; but it is the creature of their power, the instrument of their convenience.
>
> *Packer* v. *People*, 8 Colo. 364, 365.

The constitution may be supervised and reviewed by Congress or it may not. That of Colorado was not, and that of Oklahoma was.

Mr. Justice Lurton in speaking, for this court, of the Oklahoma Constitution, said:

> A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such, subject to alteration and amendment by the State after its admission. Its force would be that of a State constitution, and not that of an Act of Congress.
>
> *Coyle* v. *Smith*, 221 U. S. 559, 568. See also.
>
> *Ex parte Webb*, 225 U. S. 663, 690.
>
> *Wilcox* v. *McConnell*, 13 Peters, 498, 516.

So far as we have found, this argument when it has been made by the Courts, has consisted merely of an assertion that the United States, by permitting the State to insert a claim to the waters in its constitution and by ratifying that constitution, has assented to the claim and done that which vests the water in the State. (See *Stockman* v. *Leddy*, 55 Colo. 24).

[illegible] case that we have found has any attempt been [illegible] to analyze the proposition, and in only one [illegible] any authority been cited. Our search has not been exhaustive however, and there may be [illegible]. The case in which the authority was cited is *[illegible] Investment Company* v. *Carpenter*, 9 Wyoming, 110, 135, 136. The passage in point is as follows:

> So far as proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration, by the act of admission, which embraces the following provision: "And that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed." *McCornick* v. *Western Union Tel. Co.*, 79 Fed. 449. In that case the circuit court of appeals for the 8th circuit of the United States, held that under a similar provision in the act of Congress, admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of Congress.

In [illegible]*nick* v. *Western Union Telegraph Company* [illegible] sole authority cited by the Wyoming court the question was as to the right of removal to the United States court of a cause that was pending in one of the territorial courts of Utah at the time of the admission of the State. By specific provisions in the enabling act Congress had empowered the constitutional convention to provide

by ordinance for the transfer of all such cases to the Federal and State courts. The convention, pursuant to that authority, embodied a provision for that purpose in the constitution. The question before the Circuit Court of Appeals, and the one which that court considered, was whether or not what Congress had done amounted to an unconstitutional delegation of its own powers. The decision was that it did not. That is far from holding, as the Wyoming court states, that "all the provisions of the Utah constitution were invested with all authority conferred by any act of Congress" or that property rights of the United States would pass to a State by an assertion of ownership of them in a State constitution.

> The adoption in the constitution of a State, or the enactment by its legislature, of a provision that all waters within the State are the property of the State or the Public, can in no way effect the rights of the United States in and to those waters, but all rights acquired by the State must be subject to the rights of the general Government.
>
> 1 Kinney, Irrigation (2nd Ed.) Sec. 388, p. 657.
>
> A State, therefore, has the power to dedicate its waters to itself or to the public, as far as its own rights in those waters are concerned, and to regulate the use between its citizens. But to hold that a State constitutional convention or a State legislature could virtually appropriate all the waters

flowing over the public domain and belonging to the United States to itself, and acquire a good title thereto, would be too much like holding that an individual could make a deed to himself of other people's property and acquire a good title thereto.

1 Kinney, Irrigation (2nd Ed.) Sec. 388, p. 660.

(b) The argument based on the necessities of the arid region examined. It wrongly assumes that the riparian system is not suited to western conditions and that, therefore, the States can dispose of the Federal property in water.

Free appropriation of water, like free appropriation of land and minerals, was originally, as we have said, the outgrowth of conditions in the West, when, by the nonaction of Congress, all of the property of the United States could be freely taken and used by persons who were technically trespassers. Later, the protection of the rights thus acquired was the principal thing that the courts and the legislatures had in mind. The thought was that if riparian rights were recognized these possessory rights would be destroyed, and that if riparian rights could in some way be denied they would be protected. After the controversy was settled, as far as the United States was concerned, by the act of 1866, it was still thought that the development of the West demanded the free appropriation of lands and water and that the denial of riparian rights was somehow necessary to that end. All of the property

in those States, except the possessory rights which had been recognized by Congress, belonging to the United States, and Congress having by that act legislated in favor of State laws, all the States had to do to prevent riparian rights from attaching to the riparian lands as the Government granted them, was to declare by law that such rights should not so attach, and that water rights should only be acquired by appropriation. They actually did this by legislation and by the decisions of the courts.

The courts, however, in their opinions confused the riparian system as a system of water-right tenure, with the idea of free appropriation, and in some cases said that the appropriation system was better adapted to an arid region than the riparian system. They overlooked the fact that the appropriation feature of the system, that goes by that name, has nothing to do with that system as one of water-right tenure and is only a means of acquiring rights to real property, just as the entering of public lands or of a mining claim is a means of acquiring title in those cases. Further, they thought that it would be better for the development of the West if water rights should be absolute in character rather than relative, probably because, from the circumstances that surrounded the original settlers, water rights had assumed that character. They were unfamiliar with the basic principles of the riparian system and did not realize its flexibility. Many of them thought that irrigation and other extensive uses of the water were not permitted by that system

and that, therefore, less land would be watered under the riparian system than if free appropriations were permitted. However that may be, it is apparent from the early decisions and from those of the present day that the matter has not been analyzed and that no distinction has been made in the cases between the appropriation system as a means of acquiring rights and that system as a method of holding and using them.

As we have already shown, irrigation was permitted and more or less frequently practiced under the common law. It was one of the reasonable uses that the riparian owner could make of the water and that could not be objected to by other riparian owners. It would make no difference, however, if this were not the case, because the principle of the common law was that the riparian owners, taken together, could do what they would with the stream and that their rights, among themselves, were to be determined upon the principle of equality, and, therefore, that any use in the circumstances that was reasonable, both as to manner and extent, was permitted. In order that the various permitted uses could be enjoyed and protected, it was common practice under the riparian system for courts of equity to apportion the stream between the several owners. This was done in some instances even with respect to domestic uses. For a full discussion of this subject see Mr. Wiel's Work (p. 820), where he shows that apportionment between riparian owners, which is common in California, was a recog-

nized equity practice and that the California custom is not a modern departure.

Whether the western courts, if they ever had gone into the matter, would have held that the riparian system was not applicable to western conditions, is a question. It probably can be safely said that it is also a question whether, when the Western States are fully settled and all the public lands are taken up and all of the water of the streams put to use, more lands would be irrigated and more crops raised under the one system than the other.

Probably the only striking difference between the appropriation system and the riparian system is the fact that under the former the rights are absolute, while under the latter, they are relative. There is, of course, also the difference that the appropriation right may be used anywhere, while the riparian right, as against other riparian owners, can be used only within the watershed. However, the appropriation right, when it has once been acquired, may not be changed as to point of diversion, place or manner of use when such change would be to the injury of any other water users from the stream, whether they are senior or junior to the right in question. Changes of use usually do involve an injury to others, so the appropriation system in this respect is like the riparian system, as the appropriator must get the consent of other users on the stream to make a radical change.

The appropriation system permits water to be used anywhere, provided the use is a beneficial one;

and the courts have been liberal in allowing water to be transported to great distances through open and porous ditches, so that great losses are often occasioned. This fact, as far as making the best use of a stream is concerned, balances the correlative feature of the riparian system, which might in some instances fail to put the water to its highest use, by dividing it up between too many owners. Whenever this would be the case, though, under the riparian system, it is likely that the water would be put to a high use by some of the riparian owners purchasing the rights of others.

There is a tendency even now in the West for the rights of water users to become correlative and some of the State legislatures have attempted to make them, to a certain extent, of that character, by providing that the waters shall be apportioned among the several appropriators when the stream is at low stages. (*Wiel, Water Rights*, secs. 309 and 313).

Water is of such great value in the arid region that its full use, and, as far as possible, its best use, is necessary. Such best use is not being brought about by legislation, however, but by purchase and condemnation. As the low flow of the streams becomes fully appropriated no further development can take place without a storage of flood waters or a consolidation of ditches and lands irrigated. The modern tendency is, therefore, to undertake great projects which will accomplish these things. The flood waters are stored, and new and larger ditches take the place of the numerous small ones. Water is

conserved in both ways. It is often impracticable to undertake these projects unless the vested rights can be acquired or brought into the project in some way. This is often done, and when it is done, it is usual to put all of the rights of the water users on an equal basis. The water users, then, have correlative rights, as they do under the riparian system. The project, as a whole as against other users on the stream, if there are any, has the various absolute rights that it has acquired. If the project utilizes all of the waters of the stream the situation is exactly like that at common law, except, of course, that the lands are not necessarily riparian. (See statement of Mr. Bien, then supervising engineer of the Reclamation Service, quoted in *Wiel, Water Rights*, pp. 169, 339.) In these cases, where absolute rights are transformed into relative rights, the change is brought about in the same way that absolute rights have always been created, that is, by the grant of the owner or owners of the real property rights involved.

All of these systems have their firm foundation in the common law. The United States, as the owner of the innavigable waters under the common law, could, in perfect keeping with that law, grant the riparian and appropriation rights that it has granted. In California and the other States that follow her lead grants of both kinds were made. In Colorado only grants of appropriation rights were made. In both the appropriation and riparian States new kinds of uses are being made and new kinds of rights are

being created. Correlative rights are being turned into absolute rights and absolute rights are being turned into correlative rights. All these changes are being made by grant, and with the full knowledge that the subject matter is real property of the highest value. It would be unsafe to say that any particular system that exists to-day in these States is the best suited to conditions there or that any one of these systems is not suited to those conditions.

Even if the appropriation States had deliberately decided that the appropriation system was better adapted to their conditions than the riparian system and, therefore, desired that it should be put into effect, they would have been powerless to accomplish any such result without the consent of the United States. Their decision in that regard would have meant merely that they thought that more or better lands would be irrigated if absolute rights were acquired by those who should become the owners of the lands, and that the result would be best if a system of free acquisition of such absolute rights obtained. The waters would of course be of no use without the land, so the States, even if they could control the water, could accomplish nothing unless the United States provided a means for conveying the land so as to carry out the State's purpose.

Even conceding, *arguendo*, that the appropriation system would in the end produce better results than the riparian system or a lease or sale system or any other plan that a proprietor might devise for the disposal of his property, it could not be imposed

upon the United States with regard to its waters. If, the fact that one system of holding water rights is better suited to local conditions than another, is a sufficient reason for holding that the United States, which under the law owns those water rights, shall not own them, it must follow that a similar decision as to land rights would produce a similar result. It may well be that the prosperity of the arid States would be greater if the United States would convey its lands in smaller or larger tracts or would set aside certain of its lands to be held and used as commons; but would that be any warrant for the law's interfering with the plans of the United States with regard to that property? The Federal Government, of course, can make or ruin the prosperity of a State by the manner in which it disposes of the public domain, but no differences of opinion, as to how that property should be disposed of, can affect in any way the power of Congress to make the choice for itself. As a matter of fact, Congress has supported the local view and has arranged the disposition of the Federal property in full accord therewith, so that the opposition to ownership by the United States of the waters on the public lands, is simply opposition to the right of Congress, rather than the States, to have the disposal of that part of the Federal property. If the disposal of that part of the Federal property were in the hands of the States it would not change in the least the plan that they, themselves, adopted and approved; and its only practical result would be to give the

States the power to determine whether or not the Federal Government, in the use of its remaining lands and the carrying out of its Federal policies, may use the unappropriated waters of the streams and lakes. Of course, the fact that unappropriated waters belong to the United States leaves it within the power of Congress to change its policy as to future appropriations, but a radical change in that respect is not likely.

Government reclamation projects, whether of public lands or of Indian reservations, fit in perfectly with the water-right tenure features of the appropriation system. The United States holds its water as it does its land, for appropriation by others, until it withdraws or reserves some of it for the accomplishment of a Federal purpose. When it does reserve water it reserves only so much thereof as is necessary for the purpose intended and holds it, in all essential respects, as an appropriation water right. The right is, of course, subject to the grants, by appropriation, already made, and whatever water is left in the stream after the Government's reserved right is taken out, the Government holds for others to appropriate and for further reservations by itself if the need arises. The priority of a Government's reserved right is the date when it made the reservation. The right takes its place in the order of rights on the stream given it by that date.

Winters v. *U. S.*, 207 U. S. 564;
Conrad Investment Co. v. *U. S.*, 161 Fed. 829.

(c) Water rights being vested rights in real property, the State has the same and no greater control over them than over vested rights in land. The argument that water is public juris is unsound in reason and unsupported by authority and is advanced merely to support State as against Federal ownership.

Undoubtedly the States have the power to control individuals in their use of water. This right of the State may not be confined to the police power, but it can not go beyond that power and the right of eminent domain. Whatever the power is, it is limited by the provisions of the Fourteenth Amendment protecting vested rights. The power itself is the same as that which the State has over vested rights in lands. Water rights, as we have seen, under both the appropriation and the riparian doctrines, are vested rights in real property, which can be lost only by grant, condemnation, prescription or abandonment.

The Massachusetts court in a case decided in 1909 (*Home for Aged Women* v. *Commonwealth*, 202 Mass. 422, 433–434) explained the distinction in this respect, between the rights of a riparian owner in navigable and innavigable waters. Mr. Chief Justice Knowlton, who wrote the opinion, said:

> It is to be noticed first that the nature of their ownership on the border of tidewater differs from the ownership of a riparian proprietor upon an innavigable river or small stream. The title of the owner in the latter case goes to the thread of the stream, or, if his estate extends beyond the stream he owns all

> of the land under the water with a right to the flow of the water which goes with the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them except such as it has in all parts of its domain for governmental purposes. But the common law and the Colonial Ordinance give owners on the shore of the sea or on navigable tidewater in bays, harbors and inlets only a limited right beyond the line of their private ownership. Their right is that of members of the public for whose benefit the property is held by the State, with such special advantages to their property in the use of these public rights as come from its contiguity.

The Colorado Supreme Court says:

> Rights to the use of water for a beneficial purpose, whatever the use may be, are property, in the full sense of that term and are protected by Section 15, Article II, of our Constitution, which says that "private property shall not be taken or damaged for public or private use without just compensation."
>
> *Sterling* v. *Pawnee Co.*, 42 Colo. 421, 426.

The ways in which this power of the State is exercised, of course, will differ in accordance with the kind of property, the use of which is to be affected or controlled. Thus, we have regulations limiting the use of land for the public good that would not be at all applicable to water, and, *vice versa*, we have regulations concerning water that could not apply to land. Of this character are the administrative rules

and the means of enforcing them, by which officers appointed by the courts, or provided for by statute, see to it that gates are opened and shut so that the waters will be apportioned to the various owners of rights therein, according to the decrees of the courts by which they have been defined and established. This is a clear exercise of the police power, and is so held by the courts.

> The State's office is regulative, to see that those who use the water do not violate their duties to each other; and hence acts in its sovereign capacity only—not as owner of the water; the State operates only under the police power.
>
> *Wiel, Water Rights*, 3rd Ed., p. 197.
>
> No lawyer denies that sovereignty or regulative power over public uses of waters, under the police power, resides in the States; and this has not been distinguished from ownership thereof.
>
> *Wiel, Water Rights*, 3rd Ed., p. 196.
>
> This court has repeatedly upheld the irrigation law of this State as being the exercise of the police power of the State.
>
> *Roberson* v. *People*, 40 Colo. 119, 124.
>
> They (the water adjudication statutes) have been held to be a legitimate exercise by our general assembly of the police powers of the State, and the proceedings thereby furnished are in the nature of a proceeding *in rem*.
>
> *Broad Run* v. *Duel*, 47 Colo. 573, 579.
>
> The statutes are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, and to this end

to provide a system of procedure for determining the priorities of rights as between consumers.

Combs v. *Farmers*, 38 Colo. 420, 428.

Undoubtedly the State also has the right, in the interests of the public health and general welfare, to prevent the pollution of streams, but the same right extends to preventing a use of land that would be detrimental to the public in the same way.

Both appropriation and riparian rights may be lost through adverse possession (*Wiel, Water Rights*, 3d ed., sec. 579, p. 622 and sec. 863, p. 916); and it is held that the appropriation right may be lost by abandonment. The rules with regard to abandonment of a water right are the rules of the law concerning abandonment generally. The determining question is whether the circumstances show an intention on the part of the owner to abandon his property. Nonuse, however long continued, is generally only considered as an element in determining that fact. (*Wiel, Water Rights*, 3d ed., sec. 569, p. 608.)

The statutes in many States, however, provide that if the nonuse shall continue for a certain length of time, abandonment will be presumed. These statutes, however, are like those governing adverse possession and are supported on the same principle. (*Wiel, Water Rights*, 3d ed., sec. 576, p. 618.)

The courts in the appropriation States have the right to determine the amount of water necessary to irrigate crops or necessary for other uses and so to fix the limits of the appropriator's right. This is simply

because the water right does not vest in the appropriator until he has applied the water to a beneficial use and it only vests to the extent of that use. The courts do not attempt to prefer one use over another, as all uses that are beneficial are recognized, and when once the appropriator has applied water to any beneficial use he has a vested right that can not be taken away from him without just compensation. (*Wiel, Water Rights*, 3d ed., sec. 284, and cases cited in footnote 4, p. 300.)

If, under the pressure of a need in the public interest, there should be legislation to restrict the use of water to the more valuable and productive crops or to enforce an abandonment in case the water were not used, it could be supported under the police power, just as similar legislation with regard to the use of land could be upheld and just as the State would have the power to prevent the destruction of forests on private land where they were needed for the protection of stream supply and the like.

In the appropriation States the argument is now frequently made that water is *publici juris* and so under the control of the State. We can not see how this can be, as in all of those States the laws contemplate the complete appropriation of the streams. The constitution of Colorado, for instance, provides (Art. 16, sec. 5): "The water of *every* natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public and the same is dedicated to the use of the people of the State, subject to appro-

priation as hereinafter provided"; and again (sec. 6): "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." It is therefore seen that if the waters are *publici juris*, they are so only to serve a temporary end. It is merely to make the State the conduit by which those things which are owned by no one, under this theory, all become owned by some one. The State becomes merely the agency by which that, which it says belongs to the so-called negative community, is all transformed into ordinary rights of real property, owned by its citizens. These rights were real property under the common law, but according to this argument, their ownership can not be left where the common law puts it. The desire is to have them all ordinary real property rights again, but in order to redistribute them, the expedient of calling them things owned by no one is resorted to.

The Supreme Court of Wyoming, in the leading case of *Willey* v. *Decker*, 11 Wyo. 496, 533, puts the matter rather frankly by saying: "Under the rule permitting the acquisition of rights by appropriation, the waters become perforce *publici juris*." They do, of course, if the rights of their owner are ignored, and, in the same way, if the rights of the owner of the public lands were ignored and the State courts held that their free appropriation was not by the permission of the United States but by permission of the States, they would be forced to hold that the lands were *publici juris*, or in some other way under the control of the State sovereign. The

Wyoming court in the same case (p. 533) goes on to say that the waters of natural streams "are to be regarded as belonging to the public, subject to the right of appropriation." Here, there is clearly no public interest to serve by State ownership, save only the getting of the property into the private hands that the State chooses. The legislatures of the States are to be denied the right to withhold the waters from appropriation, and waters are to be subject to that right of the people, to be exercised by them as individuals.

The same court in the same case (p. 530), quoting *Coffin* v. *Left Hand Ditch Co.*, *supra*, says that "the doctrine of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil," and it makes the assumption that we have already referred to, that irrigation was impossible under the riparian system. The court then goes on to say (p. 534): "Whatever title, therefore, is held in and to such water, resides in the sovereign as the representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor."

We have quoted from this case because it is one of the leading cases—if not the leading one supporting the theory of State as against Federal ownership of innavigable waters. Its doctrine and the doctrine of all of these cases that put State ownership upon the ground that waters are *publici juris*, is, in reality, that they must be so in order that the State

may have the title. However, those cases usually go back to the expressions in Blackstone and other early English writers and to expressions in the civil law, from which the confusion on this subject of *publici juris* arose. As we have seen, the confusion was in failing to distinguish between the corpus of flowing water, which is not considered either in the civil law or in ours as being owned, and the right to use the water, which is the right of prime importance in the law and the one that is real property at common law and is real property under the system of appropriation. Upon analysis, even these expressions in the old law, which caused the confusion, will be found to refer to the corpus of the water while it flows in the stream, and not to the right of use. They are only misleading when they are read without the distinction between these two ideas in mind. This is the conclusion that Lord Denman came to in *Mason* v. *Hill, supra*. The whole question, as we have already said in the first part of this brief, was settled finally long ago in England by *Mason* v. *Hill* and other cases, and in this country by a series of cases, of which *Tyler* v. *Wilkinson, supra*, decided by Mr. Justice Story, is the classical example.

In spite of the fact that it is and has been the settled law of England and of this country that innavigable waters are not *publici juris;* that the right to their use and the full right to it, belongs to the owners of the riparian land unless they have granted them away; that that right is not dependent

upon appropriation or use, long continued or otherwise; and that it does not come from the Crown or other public authority nor is otherwise derived than is the title to land itself, we think it proper to examine still further the reasoning upon which the argument to the contrary is based.

When this argument is made in its more extended form, it is that the water itself, being a fugitive, fleeting thing, is incapable of ownership, unless and until it is reduced to possession. Then, by way of bridging a gap, it is argued that by taking possession of some of the water the appropriator obtains the right to take other water, and so gets a water right. That is to say, he who captures certain individual drops or particles of water flowing in the stream, obtains thereby the right to capture other drops or particles that may be flowing there in the future.

The argument, as we understand it, seeks to get away from the idea that the one who gets a favorable position from which to capture the fleeting substance, or, in other words, has access to the stream, obtains the right, because that comes perilously near being the riparian doctrine. It tries to avoid having the right depend, in essence, upon the possession of land, or the obtaining of access to the stream, or anything of that sort, and to find the true foundation of the individual's right in the fact that he has reduced to possession a fugitive thing, which, because it was of that character, belonged, before he captured it, to the sovereign. The reasoning has a gap in it that it is impossible to bridge.

One does become the owner of the very substance of the water that he actually takes into his possession, by putting it into a bottle, for instance; and he continues to be the owner of it so long as he keeps it in his possession; but it is only by a fiction that the ownership of what is in one's possession can be said to give him the ownership of what is not, or that the taking of possession of one thing can be said to amount to the taking of possession of another, or that the capture of some water can be said to give one a water right.

We find no fault with the proposition that he who first occupies unoccupied things gains a sort of moral right, good against every one but the true owner, to continue his occupancy.

In *Atchison* v. *Peterson*, *supra* (p. 515), the possessory rights of the miners on the public domain were recognized as good against each other on this principle.

Further, we find no fault with the claim that a stream or part of it, or, to be more accurate, a water right in a stream, is the sort of thing that can be occupied. The settler on the public domain, who establishes his residence on a tract of land a mile or more from a stream and builds a ditch from the stream to that land and diverts water through the ditch, can well say that he has gained a right, even in the absence of the public-land laws, good against all others except the true owner, not only to the land and the right of way for his ditch, but to the water right. He can say that he has done that in connec-

tion with the stream which can be said to give him as good a right to continue to do it as his occupancy of the land gives him a right to continue to hold that. But on the other hand, we deny that the right so acquired is based in any way upon the fleeting character of the particles that compose the stream or upon the impossibility of their being subjected to ownership unless they are taken and kept in possession.

The whole matter, as we have said, is, to our mind, academic, as the law has been settled against those who would claim that innavigable waters are *publici juris*. It is now advanced merely to support State as against Federal ownership. If it were to be adopted as sound reasoning for the appropriation States, it would disturb the law of waters everywhere in this country. Being based in its pure form on the nature of water itself, it would apply as well to water in New Jersey and Illinois as to water in Colorado and Arizona.

The argument made in *Willey* v. *Decker* that waters are *publici juris* because they ought to be subject to appropriation is simply another way of saying that waters ought to be subject to disposition by the State rather than the Federal Government, and it is just as applicable to the public lands.

(d) The argument that because navigable waters and their shores and beds go to the States on their admission to the Union, in avoidance of State inequality and as one of the royalties of the British crown, innavigable waters should do likewise, is wholly unfounded.

In the first volume of Colorado's original brief (pp. 5 to 7) and in the brief on rehearing (pp. 30 to 83) some reliance appears to be placed upon the doctrine that the beds and shores of navigable waters go to the State in avoidance of State inequality. This doctrine is too well understood to require lengthy discussion. (See *Shively* v. *Bowlby*, 152 U. S. 1, 15, 48, where its origin and limitations are explained with great care.) Because of the public importance of navigation and fishery, navigable waters were *publici juris* at common law. The lands, being inseparable from the waters, were necessarily affected by the public interest also. The title, *jus privatum*, was in the Crown; the dominion, *jus publicum*, was also vested in the sovereign, as the representative of the nation and for the public benefit. The title to the land was thus one of the royalties or sovereign rights which passed to the original States as an incident of sovereignty when they separated from England. (*Ib.*, 46, 48; *Hardin* v. *Jordan*, 140 U. S. 371, 381.) Where there were no States, the United States held this particular class of property in trust for States to be created, and the trust was executed automatically as the new States came.

What has this to do with the question whether the States or the United States owned the innavigable waters undisposed of at the time the States were admitted, or now own the waters that up to this time have not been appropriated? As we have several times pointed out in this brief, the innavigable waters did not belong to the Crown in England, but belonged to the owners of the riparian lands, and so were, like their shores and beds, real property in private ownership. There is no public interest to protect in connection with them. The interests of navigation and fishing, on which the right of the Crown to navigable waters is based, are wholly lacking. The original States did not take this class of property, and if the Western States should take it, it would not be in avoidance of inequality, but actually would be to create an inequality between the States.

(7) The question whether the United States or the States own the water of innavigable streams in the West has never been directly passed upon by this court. The cases support Federal ownership. Opinions of text writers given and statement in report of Attorney General quoted.

As we have already shown, the California law of waters is based squarely upon the Federal title and the act of 1866; and the California cases, in this respect, are followed in the other States that have not adopted the pure appropriation system, while in those States which have adopted that system the courts for the most part deny the Federal title and

seek to find the origin of all titles to water in the State. The question has never been directly passed upon by this court; however, in a number of cases this court has incidentally considered it and expressed the view that the United States has a title and right to the waters on its public lands wholly independent of State permission. In no case that we have found has this court given countenance to the contrary theory.

None of these cases lends support to the theory that the States have any inherent power to dispose of or affect the innavigable waters flowing on the public lands and all of them accord perfectly with the theory of water law, based upon the Federal title, that we have been maintaining. The dictum in the *Rio Grande Dam* case, placing limitations upon the States as to such waters, stands not only unmodified, but is supported by the later decisions.

The cases here briefly analyzed are:

Atchison v. *Peterson*, 20 Wall. 507.

Basey v. *Gallagher*, 20 Wall. 670.

Sturr v. *Beck*, 133 U. S. 541.

United States v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 704.

Gutierres v. *Albuquerque, Etc. Co.*, 188 U. S. 545.

Kansas v. *Colorado*, 206 U. S. 46.

Winters v. *United States*, 207 U. S. 564.

Boquillas Land & Cattle Co. v. *Curtis*, 213 U. S. 339.

In the early case of *Atchison* v. *Peterson* (20 Wall. 507), arising in California, and decided in 1874, an owner of water rights, acquired by appropriation in 1864, sought to enjoin subsequent mining operations on the stream on the ground that they polluted the stream to such an extent as to impair the plaintiff's prior rights. These prior rights were conceded in the opinion, but the injunction was denied because the proof failed to show that they were infringed. The opinion, by Mr. Justice Field, treats mining and water rights as on the same footing and as both coming from the United States. It also recognizes the right of the Federal Government, as the owner of both the land and the water, to convey the water separately from the land. The opinion in part reads:

> But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and

> Territories by their customs, usages and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories. * * *
>
> This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866. The Act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its 9th section declares "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. at L., 253.
>
> The right to water by prior appropriation, thus recognized and *established* as the law of miners on the mineral lands of the public domain, * * *

In the following year, 1875, this court, speaking by the same learned justice, held in *Basey* v. *Gallagher* (20 Wall. 670), that waters could be appropriated for agricultural purposes as well as mining, and reaffirmed the position taken in *Atchison* v. *Peterson*. Speaking of *Atchison* v. *Peterson*, the court said:

> We had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain and we

> there held that by custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use or took the necessary steps for that purpose was regarded *except as against the government* as the source of title in all controversies respecting it. (p. 681.)

Basey v. *Gallagher* was a suit brought by a ranch owner to protect his prior appropriation of water for irrigation from infringement by a subsequent appropriator. The opinion (p. 681) points out that neither party had any title to the land, from the Government, and so the question of riparian rights did not arise.

> The question on the merits in this case is whether a right to running waters on the public lands of the United States, for purposes of irrigation, can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can, therefore, arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present, both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.

In *Sturr* v. *Beck* (133 U. S. 541) decided in 1890, the question of the rights of a private riparian land owner did arise. Beck, as successor to Smith, an appropriator of a water right, sought to enjoin inter-

fer ace therewith by Sturr, the owner of riparian l d who had initiated his right to the land before the wr r right appropriator had initiated his rights. The i.gu tion was refused. The opinion by Mr. Chief ustice Fuller, after stating that "the right of a rip an proprietor of land bordering upon a runnin eam to the benefit to be derived from the flow . it waters as a natural incident to or one of the e ments of his estate, and that it can not be lawfu y diverted against his consent, is not de-n ," nd that "the question raised is whether Smi . cupied the position of a riparian proprietor or . rior appropriator as between himself and Sturr — the latter undertook to locate an alleged water righ " quotes the acts of 1866 and 1870. It then evie to the statement in *Atchison* v. *Peterson* to the effe that when the Government is the sole proprie of all of the lands, whether bordering on a stream or otherwise, there is no occasion for the appli ion of the common law doctrine of riparian proj orship, and states:

> Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the supreme court to that effect.

The question was whether in Dakota the acquisition of riparian lands under the laws of Congress amounts also to the acquisition of a water right. The holding that it does is in exact accord with the theory of Federal ownership of both land and water. Riparian rights were recognized by the local law as also were appropriation rights. The Federal Government's grant of riparian land, therefore, carries with it a grant of riparian water rights, since Congress has made no provision to the contrary as it has, as we have shown, with regard to patents of lands in the Black Hills Forest Reserve (34 Stat. 233, 234). To put the matter another way, as the opinion does, the land entryman under such circumstances "appropriates" both the land and the water. There is here, as also in *Atchison* v. *Peterson*, and *Basey* v. *Gallagher*, no thought of title to the water coming other than from the United States or of its originally being held by the United States in any other capacity than that of a proprietor. All of these cases are in strict accord with the California doctrine, the basis of which is the Federal title.

The proposition that the United States is the owner of the unappropriated water on the public lands and its correlary that the appropriation system, so far as it is legally effective, is the creation of Congress and not of the States finds strong support in the next case to come before this court in point of time. That case is *United States* v. *Rio Grande Dam and Irrigation Company* (174 U. S. 690). It was a suit by the United States to restrain the building by the defend-

ant company of a dam across the Rio Grande in New Mexico and appropriating the waters of that stream for irrigation to the detriment of navigation. The court assumed, for the purpose of its inquiry, that the defendants were intending to appropriate the entire unappropriated flow of the river at the point where they proposed to construct the dam, and that such appropriation would "seriously affect the navigability of the river where it is now navigable." (P. 702.) The decision was that the cause should be remanded with instructions to order an inquiry as to whether the intended acts of the defendants would substantially diminish the navigability of the steam, and, if so, to enter a decree restraining those acts to that extent.

The opinion, by Mr. Justice Brewer, is important here because the limitations upon the power of the States to deal with innavigable waters were considered from the standpoint of the Federal proprietary interest as well as from that of the Federal power to protect navigation. In part the opinion is as follows (p. 703):

> Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: *First, that in the absence of specific authority from Congress a state can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the*

Government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

Further along in the opinion, the water sections of the act of 1866 and of the desert land act are quoted and it is stated that "obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water, in contravention of the common-law rule as to continuous flow," and "in reference to all of these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries." The conclusion is then reached that it was not the intent of Congress by the acts above referred to to permit appropriations to the detriment of navigation.

The next case, in point of time, is that of *Gutierres* v. *Albuquerque, etc., Company,* 188 U. S. 545, heretofore considered by us, in connection with our argument that those cases which hold that United States and Mexican grants of land in pure appropriation states do not carry grants of riparian water rights, are in full accord with the theory of Federal ownership of unappropriated waters. In this case an act of the legislature of the Territory of New Mexico, incorporating the defendant ditch company, was drawn in question.

The opinion, by Mr. Justice White, assumes, *arguendo*, the title to the water on the public lands to be in the United States, and upholds the local legislation as being such as permitted by the act of 1866 and subsequent legislation of Congress. It reasserts the proprietary rights of the United States as they were asserted in *United States* v. *Rio Grande Dam and Irrigation Company*, *supra*, and points out that it was the purpose of Congress "to recognize as well the legislation of a Territory as of a State with respect to the regulation of the use of public waters" (p. 553). We quote further from the opinion (p. 552):

> The contentions urged upon our notice substantially resolve themselves into two general propositions: First, that the territorial act was invalid, because it assumed to dispose of property of the United States without its consent; and, second, that said statute, in so far at least as it authorized the formation of corporations of the character of the complainant, was inconsistent with the legislation of Congress and therefore void. These propositions naturally admit of consideration together.
>
> The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property not of the Territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and

> dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 704–706, the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866, c. 262, sec. 9, 14 Stat. 253; Rev. Stat. sec. 2339, Congress recognized, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, law and decisions of courts in respect to the appropriation of water."

The desert-land act, the right of way act of 1891, and section 8 of the reclamation act are then mentioned and in part quoted, and the opinion then proceeds (p. 554):

> It would necessarily seem to follow from the legislation referred to that the statute which we have been considering is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States. Of course, as held in the *Rio Grande Case* (p. 703), even a state, as respects streams within its borders, in the absence of specific authority from Congress, "cannot, by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be

> necessary for the beneficial uses of the government property;" and the power of a state over navigable streams and their tributaries is further limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by Congress.

Kansas v. *Colorado*, 206 U. S. 46, decided in 1907, is not an authority to the contrary of the position taken in *Rio Grande Dam & Irrigation Co.* v. *U. S.* The Government there sought to maintain its intervention upon the broad theory that because the policies of Colorado and Kansas, respecting the use of the waters of the Arkansas, were conflicting, and because neither State was competent to regulate that use outside of her own borders, the entire power of regulation must be held to reside in the United States. Such a Federal power was said to be essential to insure the reclamation of arid lands—not lands of the United States alone, but arid lands generally. This was claimed as an inherent power of sovereignty—a sort of national police power springing from the needs of the situation. The opinion, of course, concedes the power of the United States to control the disposition of its public domain. Its interest in the use of water upon its own lands or the advantageous reclamation, use, and disposition of its own lands, or its general proprietary interest in nonnavigable waters was not in issue.

Winters v. *United States* (207 U. S. 564), discussed at the beginning of this brief, was decided a year after *Kansas* v. *Colorado*. The suit was brought by the United States to restrain appropriators of waters of Milk River in Montana from preventing those waters from flowing to the Fort Belknap Indian Reservation in sufficient quantity to supply the needs of the reservation. In 1888, while Montana was still a territory, Congress ratified a treaty or agreement with the Indians, under which the Indians ceded a large area of land to the United States, and Congress, in turn, set aside for their use the reservation referred to; and it was expressed in the agreement that this was done so that the Indians might "become self-supporting as a pastoral and agricultural people." Milk River, an innavigable stream, was designated as the northern boundary of the reservation, but the agreement made no mention of its waters and made no mention of any waters as reserved for the Indians. The State was admitted into the Union in the following year. The Government used a small quantity of water on the reservation, and above it on the river a considerable farming community of white settlers subsequently grew up. The prosperity of this community was largely based upon the use of Milk River water that had been appropriated under the desert land act and the local laws. The lower court held that, under the circumstances, a reservation of sufficient water for the needs of the Indian Reservation must be implied, and enjoined interference in any manner with the

use by the reservation of 5,000 inches of water, which was a much greater amount than had at any time been used by the Government or the Indians. This decree was affirmed by this court.

The opinion by Mr. Justice McKenna, after holding that a reservation of water in favor of the Indians must be implied, concludes:

> Another contention of appellants is that if it be conceded that there is a reservation of the waters of Milk river by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original states." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject to appropriation by the citizens and inhabitants of said state, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States* v. *Rio Grande Ditch & Irrig. Co.* 174 U. S. 702; *United States* v. *Winans*, 198 U. S. 371. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress

destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, and yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union and the power over the waters of Milk river which the State thereby acquired to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effects make it unnecssary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government.

It will have been noticed that neither the appropriators' argument that a State, by the fact of its admission as a State, acquired the right to dispose of the waters of the river, nor the claim made by the Government that the reservation was entitled to riparian rights, was discussed in detail, because the court's "construction of the agreement and its effects made that unnecessary." The "effect" of the agreement was to reserve the water, and it was held that "the power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be." As supporting this proposition only the two cases of *United States* v. *Rio Grande Dam & Irrigation Co.* and *United States* v. *Winans* were cited. The Government's power is, therefore, put upon two grounds, first, that a State's

right to dispose of the waters of innavigable streams within its borders is limited by its lack of power to destroy "the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property," which is the doctrine of Government ownership for which we are contending; and, second, that the United States, at the time when the reservation was made, which was before the admission of the State, as the possessor of full sovereignty, both national and municipal, Federal and State, had full power to reserve the waters, even if they were, like the beds of navigable streams, property of a character that, if undisposed of previously, would pass to the State upon its admission to the Union. The holding that it was unnecessary to discuss the Government's claim of riparian rights as such is significant in view of the opinions being based, in part, at least, upon the doctrine of the *Rio Grande Dam* case. It is, we submit, equivalent to saying that, even if riparian rights do not exist in Montana, the United States is entitled to, at least, enough of the waters flowing upon its own lands to supply their needs as was stated in the *Rio Grande Dam* case.

The decision in the *Winters* case upholds the doctrine of Federal reservation of water rights, and has been followed in *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C. C. A.).

Boquillas Land & Cattle Company v. *Curtis* (213 U. S. 339), decided in 1909, and above discussed in

our consideration of the question of Federal and Mexican grants of land not carrying with them riparian water rights, was, as we there said, a case in which the owner of a Mexican land grant on the San Pedro River in Arizona sought to enjoin a diversion from that stream on the ground that it would interfere with its rights as a riparian owner. The relief was denied. The main thing considered was whether the land owner, because of its ownership of riparian lands under its grant from the State of Sonora, was entitled to riparian rights in the water as at common law, and it was held that it was not. The decision was put upon the ground that, under the law existing in Arizona at the time of the grant and since, the riparian system did not prevail, and appropriations were permitted. The source of the title to appropriation rights was not inquired into, nor was the right of the United States to convey riparian rights with its grants of riparian lands considered. The court held that the patent of the United States to the grant owner operated merely as a confirmation of the Mexican grant and in no way as an enlargement thereof. Therefore, what water rights the United States had to convey and whether a grant by the United States of riparian lands in Arizona would carry water rights, were questions not decided.

The opinion says in effect that, in view of the holding that the confirmatory patent was not to be taken as a grant from the United States, but merely as a confirmation of what Mexico had already granted,

it was not necessary to decide whether a patent from the United States, made after the passage of the Desert Land Act, would carry riparian rights. It will be remembered that that act provides that "* * * All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights," and that the supreme court of Oregon in *Hough* v. *Porter*, *supra*, 51 Oreg. 318, decided that after that act the United States' grants of riparian land have not carried water rights. The opinion mentions the Oregon case and says, in a passage we have heretofore quoted, that it was decided on plausible grounds. The grounds on which it was decided and which were said to be plausible, were that riparian rights had been abrogated by *Congress* and not by the State.

The attitude of the executive branch upon this subject is thus expressed by the Attorney General in his 1914 report, page 39:

> The department takes the position that in the arid and semiarid regions, where the legality of diverting and appropriating water for beneficial uses on nonriparian lands is generally established, the original right of the Government to appropriate surplus water for its own uses, particularly for the reclamation of its enormous holdings of arid lands, has not

> been surrendered by any act of Congress or divested by the mere creation of the States into which those regions have now become incorporated. This position has been sustained by one of the district courts of the State of Colorado. Its soundness has been challenged by certain claimants who would have the Federal user dependent on the permission of State laws. The question, never passed on, I am advised, by the Supreme Court, seems very important theoretically, but in practice it has hitherto been obviated by the general identity of interests, and the disposition of the Government to follow the State administrative procedure wherever practicable.

Colorado's brief (pp. 137–142) cites an opinion of Assistant Attorney General Campbell (*In re Withdrawal of Public Lands for Irrigation Purposes*, 32 L. D. 254) given in 1903, as supporting the claim that the United States has no authority over innavigable streams flowing over the public lands within a State. We can not see how that opinion can be made to bear any such construction.

That opinion dealt only with the power of the executive branch to assert the common-law rights of the United States in unappropriated waters, and expressly stated that the power of Congress in that regard was not being passed upon. The conclusion that the executive was without authority to withdraw waters from appropriation was erroneous. See the Reclamation Act, 32 Stat. 388, and *United States* v. *Midwest Oil Co.*, 336 U. S. 459.

[illegible] text-book writers who discuss the subject at all, so far as we have found, are unanimous in their support of the Federal title. Mr. Wiel, in his elaborate work "Water Rights in the Western States," 3d ed., obviously takes that position (see pp. 183, 197, 223).

Mr. Kinney in his late work (1912) says:

> Our conclusions upon this subject are, that the United States, as the original owner of all of the land on the public domain, was also the owner of all the waters of the natural streams and other bodies flowing thereon. By various Acts of Congress the United States has disposed of some of these waters under the Arid Region Doctrine of appropriation; and that the United States is still the owner of these waters, which have not been disposed of, regardless of the action of the State or Territory wherein they are located. The right to the use of other of its waters has also vested in the individuals who have from time to time acquired tracts of lands from the Government bordering upon the streams, as a riparian right, in those States where those rights are permitted. It was left to the various States, as a matter of sovereignty or jurisdiction to prescribe how the title to the use of the waters might be acquired by individuals, in accordance with its local customs, laws, and decisions of the Courts. When the local customs, laws, and decisions of the Courts had been fully complied with by an individual seeking to acquire a water right the title to the same vested in the individual direct from the United States, and not from any State.
>
> 2 Kinney, Irrigation, 2d Ed., Sec. 640.

Mr. Long, in the second edition of his work, A Treatise on the Law of Irrigation (sec 74, p. 134), says:

> More fully, according to the former view, the United States (or the State in the case of State lands), as the original owner of the public domain, enjoyed all the rights of a riparian proprietor in respect to the streams thereon, and such rights as have been acquired by settlers have been derived, either expressly or by implication or acquiescence, from the United States as grantor. In early times, prior to any federal legislation on the subject, settlers appropriated the water of the public domain, and their claims were recognized by the local customs, laws and decisions of courts, in all of which the federal government tacitly acquiesced. It may be said that the appropriator's rights then rested upon an implied or presumed grant from the United States. Finally these rights were expressly recognized and confirmed by the acts of 1866 and 1870. Rights acquired since the passage of these statutes, rest, of course, upon the express grant contained in the acts themselves.
>
> The view that the appropriator's rights are based upon a federal grant obtains in California and the other states which recognize the doctrine of riparian rights, and is also held in federal courts in cases arising in these states.
>
> The other view, which is generally implied rather than expressly stated in the opinions of the courts, is based upon the rejection of the common-law doctrine of riparian rights. It

seems to depend upon the proposition that even the United states as the owner of the land embraced in the territory of the states which reject the doctrine of riparian rights, never had any riparian rights in respect thereto, inasmuch as the state or territorial governments have never recognized those rights, and hence the rights of the appropriator could not have been derived from the United States but must exist as a product of state law. There is little direct judicial authority for this view, and it is certainly an extraordinary proposition that a state government, and a *fortiori* that a territorial government, has power to define the extent of the rights of the United States in respect to the public domain.

(8) Upholding of State control would disintegrate the law and destroy Federal interests without working any practical good to the States.

The Western States can show no grant of innavigable waters to them, so they can not be held to own or control such waters without putting the whole law in that field on a new foundation.

As we have already shown, the argument that the sovereign owns all waters because of the nature of water is either applicable in all of the States or is not applicable in any of them. Also, local conditions can not work a transfer of ownership from the United States to certain of the States without a distinction being made, which the law has never made, between water and other things which are the

subject of ownership, or without giving to the arid States a power and field of jurisdiction that is denied to the other States.

Water law in the dual-system States is incapable of explanation or of being put upon any logical basis if common-law principles and their sure result, Federal ownership, are to be abandoned in favor of any principles that can support ownership or power in the States. On the other hand, as we have seen, the appropriation system in Colorado and the States that follow her lead, rests as a matter of history and with logical completeness upon the same principles that that system rests upon in California, where it originated.

It certainly is an astonishing proposition that the owner of most of the land over which these waters flow lost title to the water at some period, near or remote, upon the mere admission of the States. The common law considered these estates in land and water as one. They could be separated, as we have seen; but normally and originally they belonged together. These particular lands were practically useless without the water, and certainly the water was useless without the land. Furthermore, access to the water could not be obtained without the landowner's permission. To say that under these circumstances the owner of all the land had no interest in the water, or that it would be desirable that one sovereign should own the land as a proprietor and that another sovereign should own the water as a royalty or otherwise would be a *reductio ad absurdum*.

Besides these objections based upon the law, there is this very important practical objection to State ownership of water—that while working no practical good to the States, because the liberality of Congress has fully taken care of appropriations within them according to their own laws, it would put the Federal Government, as the proprietor of vast areas of land, at the mercy of the States, and so would disastrously affect its great reclamation, Indian, and other Government policies.

PART TWO.

The controversy, as one involving an interstate stream, should be decided upon the basis of the Federal ownership of lands and waters, thereby confining the ownership of the States, as ultimate proprietors, to such water rights as have been or may be granted to the respective States for themselves or for use in connection with the lands within their borders.

(1) Examination of the question of division of waters between States upon the basis of State ownership of innavigable waters and disregarding the Federal title.

In coming to the question of the principles that should govern the determination of this controversy as one involving an interstate stream, it is important to be borne in mind that any division of such waters at all between the states must involve a restriction upon the right of the upper State on the stream to use all of the water. A right somewhat in the nature of an easement must be upheld over the

stream in the upper State in favor of the lower State. This is so because water rights, whether riparian or appropriation, to be of any real value (except in the few instances where the land on which the water is to be used embraces the very sources of the stream) must have two elements, namely: The right to take the water from the stream at a particular point and use it, and the right to have the water flow down to that point uninterfered with by any one above.

In this case we have the State of Colorado, within whose territory the Laramie River rises and flows for a considerable distance, contending that as a sovereign State it has the right to use the waters of that stream as it will within its own borders, regardless of the effect of such use upon the flow of the stream below in Wyoming; and contending further that if its rights do not go to that extreme, it is entitled, as against Wyoming, to an equitable share of the waters of the stream. Both of these contentions are based upon the doctrine that a State, as such, has a title to all property and resources within its borders, superior to and behind the titles of its citizens. (See *Georgia* v. *Tennessee Copper Co.* 206 U. S. 230.) That doctrine, as applied by Colorado, embraces the idea that, in the last analysis the State owns all that its citizens own and all else within its dominions, and that therefore the State has the right to say the last word as to everything within its territory—air, land, minerals, and water. This is also the conception embraced in Colorado's first contention of absolute right over the stream until it leaves

its State line. We do not understand that this idea of absolute right is insisted upon strongly by Colorado. The brief filed on Colorado's behalf, while not abandoning the idea of absolute right, concedes that the upper State's rights in an interstate stream may be limited to a certain extent in favor of the lower State, upon the theory that States, like individuals, can only enjoy their own rights in so far as their doing so is consistent with a recognition of exactly the same rights in others.

Both States in their arguments have left entirely out of consideration the fact that the United States was the original owner of all of the land, and all of the water within their borders, and still is the owner of all unpatented lands and of all unappropriated waters. They also leave out of consideration the position of the United States as a proprietor which is at the same time a sovereign, and treat the question of the rights in this stream as one involving only the two State sovereigns. But the presence of the United States, the superior sovereign, as both owner and grantor, gives the controversy an entirely different character from that which it would have if it were one between two States, the property within which was all owned by or came from the States; for since the United States has had and has granted to individuals and still has, such vast property interests in the two States, it can not be said that these two States represent, as ultimate owners or otherwise, all of the property within their respective borders.

However, before discussing the significance of the Federal title in this connection, let us examine the possibilities of a division of the waters of the stream as if the case were one where the States are entitled to say the last word as to all of the property involved.

In determining the respective rights of States in property we are entitled to assume that the broad principles of the common law are to be adhered to, generally speaking, not because those principles have any force or controlling power over the States, as law, but because they are fundamentally just, and so give rules, generally speaking, as applicable to sovereign landowners as to landowners who are the subjects of a sovereign. Under the doctrine of *Georgia* v. *Tennessee Copper Co.*, supra, the rights of States are to be considered in a broader and less technical way than those of individuals. However, in fixing a rule binding upon States, the welfare of all the States taken as a whole should be considered, and in order to do that the effect of any such rule upon the rights and opportunities of the citizens of the United States, regardless of State citizenship, must be taken into account.

The question in a controversy between States regarding a stream that flows through the lands of both is, What interests do the respective States have in that stream? That is to say, what property rights do they own in the stream as against each other?

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(a) The proposition that the upper State on a stream may use all of the water regardless of the effect of such use upon the flow of the stream in the lower State, is untenable.

This is so, both on authority and on principle. This court decided in *Kansas* v. *Colorado*, 206 U. S. 46, that a dispute between States concerning an interstate stream constitutes a justiciable controversy determinable in this court. No countenance was given to the idea that the upper State was free to use all the water. On the contrary, the idea that rights in the stream possessed by the lower State would reach up to and affect the stream as it flowed in the upper State was accepted as one of the basic principles upon which the case was considered.

One can easily imagine circumstances that would make the great use of the water of an international stream by a State situate above another thereon to the detriment of a lower State so repugnant to natural ideas of justice as to warrant the lower State in resorting to force to put a stop to it. (*Missouri* v. *Illinois*, 200 U. S. 496.) If that is so, it surely follows that between the States of our Union the principle must be recognized that the upper State is not entitled in all cases and under all circumstances to use and exhaust the stream as it will, but that in some cases at least it must, in spite of its own needs, allow a certain amount of the water flowing within its borders to leave them and flow down to the State below.

Our treaty with Mexico regarding the Rio Grande (May 21, 1906, 34 Stat. 2953) and the treaty with Great Britain involving the waters of the St. Marys and Milk Rivers in the United States and Canada (Jan. 11, 1909, 36 Stat. 2448, 2451), were made upon this theory. It is true that in both treaties stipulations to the effect that they should not be taken as precedents and should not constitute an acknowledgment of obligation were made. The fact, however, remains that in these instances where controversies actually arose, neither this country in dealing with Mexico, nor Canada and the United States in dealing with each other settled those controversies upon the basis of the upper State's being free to take all of the water.

Furthermore, the rights of the United States and the rights of private persons as its grantees make the allowance of such a claim between the two States here impossible. We have not paused to consider that matter under this head, however, as we are here considering the principles that should control the settlement of this controversy if Federal interest were eliminated.

(b) A division upon the basis of priority of appropriation illogical under theory of State ownership of water.

If the upper State is not to be allowed to use all of the water if it sees fit to do so, some rule of division of the water between the States must be found, or at least some means must be had for determining

when the uses in the upper State infringe the rights of the lower State.

Private rights in interstate streams, except where they have been decided on the basis of priorities created by Federal grants under the act of 1866, as in *Howell* v. *Johnson*, 89 Fed. 556, have been determined upon the theory that the two States permit overlapping rights to be acquired as a matter of comity, each State having in substance the same or at least reconcilable laws under which rights can be acquired by individuals and not having provided by statute, as was the case in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, that State water should not be taken beyond the State line.

Bean v. *Morris*, 221 U. S. 485.
Hoge v. *Eaton*, 135 Fed. 411.
Anderson v. *Bassman*, 140 Fed. 14.
Morris v. *Bean*, 123 Fed. 618; 146 Fed. 423.
Rickey Land & Cattle Co. v. *Miller & Lux*, 218 U. S. 258.
Taylor v. *Hulett*, 15 Idaho, 265.
Willey v. *Decker*, 11 Wyo. 496.

Wyoming, in its brief on rehearing, takes the position that priority of appropriation should govern here, notwithstanding this is a controversy between States. We understand, however, that it is her contention that that feature of the riparian doctrine which confines the uses of riparian owners to the watershed (unless all of the riparian owners consent to a diversion beyond the watershed) should likewise govern.

It is difficult to see how priority of appropriation can be adopted as the rule of decision in this case without taking the Federal title as a basis. If we eliminate the rights of the United States and the power of Congress to dispose of those rights and the consideration that the owner of those rights is a sovereign, we have two States facing each other simply as paramount landowners. As such, how can they be confined in their rights in the stream to the water that they have already appropriated, and, as to the surplus waters, be given merely a right to make further appropriations? The fact that their laws both recognize priority of appropriation as governing the rights of their citizens can have no bearing. These laws in neither instance were made to govern the State itself as against another State. No rule of comity could apply in a case where the States are seeking to assert rights *in invitum* against each other. Furthermore, Colorado has lately passed an act designed to retain such waters as she controls within her own borders. (Act of Mar. 30, 1917, Session Laws of Colorado, 1917, p. 539.)

If these States were, in truth, the original and ultimate owners of all of the property within their borders, they would have a right to a fair share of the water upon whatever principle determined, regardless of whether they had put it to use or not. Would Wyoming, for instance, be willing to admit that as against Colorado she was without power to change her local water system to-morrow to the riparian system, for instance? She certainly ought

to have that right, as against another State; and she would not have it if priority of appropriation were to be the rule between these States. If each State has full rights in the stream, save only as those rights must yield to the possession of the same rights by the other State, some rule ought to be found by which the unappropriated waters could be divided, in case either of the States insisted upon it. Only in that way could the rights of the States, treating them as original and ultimate property owners, be given full consideration, and they be left free to use their property or not as they see fit.

Clearly no rule ought to be adopted in this case that would be opposed in principle to a rule of division that would have to be adopted between other States, and the rule of priority of appropriation would not be applicable to a controversy between two riparian States. Since it would not, and such States must be considered as having full rights in the stream covering all of its waters whether used or not, subject only to the equal rights of other States on the stream, how can it be said that Colorado and Wyoming do not have exactly the same rights? There is nothing that distinguishes them from the riparian States except that, as a matter of local law, each has imposed, following out the idea of State control, the doctrine of appropriation upon its citizens.

There is another serious objection to the solution suggested in Wyoming's brief, and that is that it would leave the right to use the unappropriated waters as existing in no one unless and until they

were appropriated. That idea has never found favor in the law, and the adoption of it, even as between States, might have serious and unfortunate consequences. To adopt that theory would be to announce a new and unnecessary doctrine and one which might shake the foundations of the law of waters. Furthermore, its adoption here, if the law does not require it, might be embarrassing to the political branch of the Government in its conduct of international relations.

As to the idea that uses as between States should be confined to the watershed we shall speak below, saying here merely that if a division could or should be made between States as such it ought to leave the States free to use their respective shares of the stream as they see fit; and that a rule that confined uses to the watershed would impair many vested appropriation rights now existing.

(c) A division upon the basis of riparian rights, while logical, would be difficult to work out with justice. Present developments and vested interests could not be protected by a division upon that basis.

In *Rickey Land & Cattle Co.* v. *Miller & Lux*, *supra*, the broad outlines of what might possibly be the rule for determining rights *in invitum* between the States were suggested. This court there said (p. 261):

> It is conceivable, to be sure, that the decisions of this court may determine that the states have rights as against each other *in invitum* in streams that flow through the land of both. *Kansas* v. *Colorado*, 206 U. S. 46, 84. *Missouri* v. *Illinois*, 200 U. S. 496, 519, 520.

> These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older states. See *New York* v. *Pine*, 185 U. S. 93, 96. There may be some, perhaps limited, right of appropriation in the upper state, at least in the watershed of the stream, where irrigation is the condition of using the land. See *Kansas* v. *Colorado*, 206 U. S. 46, 100–104, 117. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his state, and those rights, the petitioner insists, can, or at least should be, determined only in a suit brought by the state itself.

It should be pointed out that in suggesting the foregoing as the possible basis of a rule in such cases as this, this court did not have before it and did not consider the rights of the United States in the innavigable waters within the States, but considered the matter entirely upon the basis of the rights of the respective States as the paramount owners of all within their borders, and furthermore, that the controversy being between private persons, the States were not before the court and their rights were only incidentally considered.

The suggested rule would mean, that between pure appropriation States or between such a State and one having the dual system (where contro-

versies of this character are most likely to arise, for irrigation is not practiced to any great extent in the pure riparian States) the rule would be that the underlying principles of riparian rights, as at common law, would be the guide. The lands capable of irrigation within the watershed of the stream and their needs, taking them altogether, and disregarding State lines, would be ascertained and all other reasonably likely uses would be taken into account. Then we assume the waters would be divided between the States according to each State's ownership of such lands. Each State could then allow its share of the water to be appropriated by individuals and the United States or could reserve it for itself as it saw fit, either as appropriation or riparian rights or both. They could use part or all of it beyond the watershed.

The ability to use water beyond the watershed is important, as without that right reclamation projects and uses of water for domestic purposes would be in many cases made impossible. The appropriation doctrine provides the most ample scope for such uses as under it watersheds are ignored. (1 Wiel, Water Rights, 3d Ed., secs. 281, 282, and 363, and cases cited.)

Uses beyond the watershed are not so freely made under the riparian system, but they are common there. The riparian owners, whose rights would be affected thereby, can join in sanctioning such use and, of course, the right to make such a use for public purposes can be acquired by eminent domain.

In working out this plan it would be possible to make a hydrograph of the stream, as it flows in both States, and then a division of the waters, as they would flow in a state of nature at the State line, could be made that would take into account the respective quantities of riparian lands in the two States and other circumstances.

It is difficult indeed to see how a division could be made, on this theory, that would take into account private vested rights. We do not mean to imply that in a controversy between independent States there would be any need to be concerned with vested rights of private persons as such. The statement in the *Rickey* case, *supra*, that if private persons obtained any advantage from an action between States it would be accidental and not by virtue of any rights that they themselves could assert, we understand to mean merely that the States in controversies against each other, if the Federal title is left out of consideration, represent everything that is under their control within their borders, and, therefore, that if State laws have permitted the holding of rights that must fall before the claims of another State, that fact is immaterial in such a controversy. The States, however, through their citizens or otherwise, having made use of the water to a greater or less extent, and, therefore, having interests built up upon such uses, it is important not only for the welfare of the particular States, but of the country as a whole, that these uses be protected if possible.

As we said with respect to a division upon the basis of prior appropriations, if the States as landowners have rights in the stream they have them whether they make use of them or not. To say that a division that would be fair if neither State had made any special use of the water would have to be modified because one State had made a special use of it, would be either to deny the State's right as a landowner or to say that it had lost, in a measure, that right by the activity of the other State. A division, however, that ignored developments already made would be disastrous in its effects. Lands in the West have been developed and communities have grown up based upon that development, by the free appropriation of water regardless of State lines.

While a division that would take into account and preserve existing developments would probably, on the whole, be a fair one as between States, it doubtless would be easy to show that on particular streams one State is now often making use of very much more water than the other state and that the practical present division so made is not at all what would be demanded by taking into account merely stream flow and the quantity of irrigable lands within the watershed in the two States. Ascertaining and providing for present uses would of course bring further complications into the inherently difficult matter of making a division on the basis of riparian rights.

Under all of these circumstances it is hardly likely that the decision of one case would be of great help in settling other cases, or what is per-

haps more important, in making other litigation unnecessary. The decision being based upon the circumstances of the case, and those circumstances being many and involved, the question of State rights in interstate streams in the West, where the matter is of such great importance, could not well be considered as settled until the matter was litigated as between all of the States and possibly as regards each stream. In the meantime, private rights would rest under a cloud of uncertainty and interstate reclamation enterprises of every nature could hardly go forward unless under agreements made by the States with the sanction of Congress.

We respectfully submit that because of the above results no rule for the determination of interstate rights that involves the establishment of such a system ought to be adopted unless its adoption is made necessary by imperative rules of law. That, however, is not the case, as the doctrine of original Federal ownership of innavigable waters and present Federal ownership of all unappropriated waters is not only sound in law but offers a solution of the problem of interstate streams that is free from difficulties involved in any other theory.

(2) A determination of this and similar controversies on the basis of the Federal title, giving to each State only such water rights as have been granted to it or for use on its lands, would: Protect existing conditions and vested rights, including Federal property and Federal projects; make possible the undertaking of further interstate projects; make litigation between States unnecessary; and would not deny to the States sovereign control over all property rightly subject thereto. Such a settlement would be the most equitable one between States, even if not necessary under the law.

Federal property within a State, being under the exclusive control of Congress, can not be affected by State laws. The Federal Government, therefore, has full power to use that property as it sees fit and may do so regardless of State lines. Having that right, it may also grant the property to others, regardless of State lines, and its grantee's title being in no way dependent upon State law, is good and can be acquired by a State only by voluntary grant or condemnation. The Federal Government owning the property regardless of State lines and unaffected by State sovereignty, the title of its grantee is good even though it is used upon lands that would not be given a water right under a division of the waters of the stream, made in disregard of the Federal title and as between the States considering them as independent sovereignties. Under this theory, the two States here, having no interest in the waters of the Laramie River, except such as they have obtained as the ultimate owners of water rights granted by the United States to them or to private persons for

use upon lands within their borders, the rights of the States as against each other are merely to protect these water rights so obtained and the determination of any controversy arising respecting them, resolves itself into a decision as to respective priorities and their infringement.

Upon this theory, the respective rights in the stream can be determined practically as well for the whole stream, as it flows in both States, as they could be if it were wholly within one State. The local laws as to the initiation and vesting of rights may differ somewhat, but that circumstance affords no difficulty. The vested rights in Colorado would take their place among all the rights on the stream, with priorities as of the dates upon which they were initiated under the Colorado law, and the priorities of the Wyoming rights would coincide with the dates upon which those rights were initiated under Wyoming laws.

The adjudication of these rights would be no more difficult than is the adjudication of rights upon a stream of equal length wholly within one of the States. In Colorado, water districts are formed and adjudications take place within those districts. The right, however, is reserved to those who own water rights on the stream that are in another district to have their rights determined in relation to those within the district, so each right can take its proper place among all the rights in the stream. (See *O'Neil* v. *Northern Colorado Irr. Co.*, 242 U. S. 20.) As a practical matter, the adjudication within the dis-

trict usually suffices, as few, if any, rights outside of the district are so affected thereby as to make a determination of their exact relation to the rights within the district necessary.

In Arizona, where some of the streams are very long and of a flashy character, with the consequence that the rivers run water throughout their lengths during flood periods and during dry periods rise and sink in the stream beds, it is common to adjudicate the rights within a fairly compact irrigated area and not to attempt to have one adjudication cover the whole stream. (See *Montezuma C. Co.* v. *Smithville C. Co.*, 11 Ariz. 99.) The rule that the stream is a unit and that the one first in time has the prior right to the use of the waters of the stream and all its tributaries above him, is not denied, but to give him this priority does not, as a practical matter, necessitate an adjudication covering the whole stream. The plan has been adopted in some instances where groups of water users situated at some distance from each other on a stream desire to have their rights fixed, of settling the rights of the groups as such, against each other, instead of attempting to give each right its exact place among all the others. (See *Anderson* v. *Bassman*, 140 Fed. 14, 28.)

The courts in these cases do not deny the rights of the individual or lay down any new principle of law, but arrive at justice in a practical way. Often the decree takes a form, theoretically irregular but practically just, by common consent of the numerous

litigants. Wherever there is a distinct invasion of a right it can be and usually is remedied, but that rarely happens where the users are far separated on the stream.

The difficulties of settling water rights are not greater when rights are recognized regardless of State lines than they would be if State lines were considered as controlling. This is so because the Western States are so great in area and the streams in them are so long that all the difficulties that arise in settling rights regardless of State lines, are present within the States. The Gila River, for instance, extends across the whole width of Arizona and the irrigated valleys along its course are widely separated.

The question of the jurisdiction of the courts is not serious, as the courts of the upper State and the Federal courts therein would be open to the citizens of the lower State and would protect their rights. This has been done in numerous instances, as shown by the cases between private persons cited above.

A determination of the rights between these particular States upon the basis here suggested would be equitable. It would be founded upon actual appropriations made from a source held open to the citizens of each State upon the same free basis. It would be in accordance with the needs in the two States as they have actually arisen. It would respect rights already vested and would protect the communities built up upon them. If it should turn out that in the end one State got more of the waters of

the stream than the other, it would only be because in the settlement and upbuilding of the whole area out of which both States are composed, it happened that more of the lands of one State were chosen for development than the other, at a time when the choice was free. The right of the two States to control the water rights within their borders, except those belonging to the Federal Government of course, would be unimpaired within the limits of their police power. They could make such rules as they might see fit, affecting the water rights of their citizens.

The administrative system of each State would have no difficulty in distributing the interstate waters. The upper State would simply have to see to it that gates within its borders were closed in times of shortage to the proper extent and in the proper order to insure the satisfaction of prior rights in the lower State. The administrative system of the lower State would then have unhampered control within that State's boundaries.

Subject to the limitation that they could not interfere with the property of the United States, the States would retain, of course, their right to have the last word with regard to all rights within their borders, and so whatever power they possess to say that the water rights of their citizens shall not be used beyond the confines of the State would be unhampered.

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The sovereign powers of the State could be exercised over all property within the State properly subject thereto.

Whatever rights the States have to sue on their own behalf or for the protection of the rights of their citizens would, of course, remain unimpaired; but such suits would probably be unnecessary, as all interstate controversies would arise, in the first instance, from conflicts between individuals, and they could and would be settled by litigation between individuals.

In order to decide this case, it is perhaps not necessary to find a rule applicable to other situations. However, Federal ownership lessens the difficulty of apportioning the water of interstate streams when the States have different systems of water law.

As we have seen, any division between States as such, if logically made, would have to disregard vested rights and the important developments built up upon them. If, on the other hand, vested rights are to be protected, and so the waters apportioned regardless of State lines, no rule can be found that would uphold local systems when those systems differ, unless it is based on the Federal title. This is so because riparian rights and appropriation rights can have no relation to each other unless they come from a common source. In a contest between them, in the absence of common origin, priority could not be the test because the riparian right always existed and therefore would always be first.

Here the Federal title resolves the difficulty. The United States, as sole owner of both land and water,

grants both riparian and appropriation rights. The riparian grantee takes subject to all appropriation rights previously granted. He has the right to share what is left of the stream with the United States and its other grantees of riparian rights.

Inasmuch as the United States still continues to grant appropriation rights, after having granted some riparian rights, the late grantees of riparian rights, taking subject to such appropriations, must share with the former riparian grantees upon that basis. The stream as to them is diminished by the subtraction of all appropriation rights, while as to the earlier riparian grantees it is only diminished by the still earlier appropriations.

The difficulties here presented arise and have been fairly successfully overcome in California and all the other dual system States. They occur in the adjustment of the rights of late appropriators with those of prior grantees of riparian land. The matter becomes a practical one when a riparian owner seeks to enjoin a subsequent appropriator who takes water above him on the stream; and when, on the other hand, an appropriator seeks to enjoin a prior riparian owner above him from making an excessive, unreasonable, or nonriparian use to his detriment. In strict theory the nonriparian user, be he the owner of riparian land or not, has no rights as against riparian owners who would be affected by his use, unless he can show a grant of some kind from them; and so any nonriparian use that he makes is illegal against them, and likewise any use that they make

can not be objected to by him as unreasonable. However, in practice, the nonriparian use is generally, if not always, permitted, unless and until it interferes with the actual needs of the riparian owners; and often the unreasonable uses of the riparian owner are restrained when they interfere with the nonriparian use.

This can not be done upon any theory that the riparian owners as a whole do not own the stream or that their rights, as against the rest of the world, are confined to their actual needs, as all nonriparian uses are made or permitted by riparian owners; but it is rather a widening in one way and a narrowing in another of the rights of riparian owners themselves.

A dog-in-the-manger policy, enforced against one who has been granted an imperfect interest in the stream, is abhorrent. Likewise the making of a nonriparian or an unreasonable riparian use as against an established use, though it be itself nonriparian and imperfect in right, offends ideas of justice. Consequently, the courts in many instances have decided as we have said. (See the full discussion of this subject and cases cited in *Wiel, Water Rights*, 3d ed., sec. 821 *et seq.*)

In California the courts now refuse to enjoin a nonriparian use that is not interfering with present needs but declare the riparian owners' rights so they will not be lost by adverse possession. (*Wiel, Water Rights*, 3d ed., secs. 802 and 833.)

Original Federal ownership puts these adjustments upon a sure foundation. The United States holds

its water and its land to be granted as appropriation or riparian rights as the case may be, and in accordance with the local law. These grants are made in vast areas, and it is not to be supposed that it intends by making one class of grants to unduly limit itself in making others. The rights granted should be construed in the light of the Federal policy, and when the two classes of grants are near enough together to conflict, the riparian rights can well yield its minor incidents to carry out the Federal policy with regard to the other rights. Giving the riparian land, as against all subsequent appropriations, a full right to such water as it needs, reasonably used, protects the riparian grant as fully as it can properly demand protection.

In practice a nice adjustment between riparian rights in one State and appropriation rights in another State would seldom be necessary. The pure riparian States are far distant from the pure appropriation States, and between them are situated dual system States in which irrigation is practiced extensively only in their western portions.

Irrigation generally takes place within the watershed, and the use of large quantities of water when the stream is high tends, by storage in the land and the slow return of such waters, to increase the flow of the stream beyond what it would naturally be in the low flow season. The storing of the flood waters in reservoirs and releasing it later has the same effect. These effects are especially apparent upon large streams.

Between rights in pure appropriation States and riparian rights in dual system States conflicts would seldom arise except between water users closely adjoining the boundary line. There a nice adjustment can be made, practically as such adjustments are made in the dual system States themselves.

Even if a determination of rights on interstate streams upon the basis of the Federal title and grants from the Federal Government were not made necessary, as, we contend that it is, by the law, it would still be the most equitable method to follow. The Federal Government, when all of the land in question was included in the Territories and before State lines were drawn, made its grants without any regard to where those lines would run. Eastern Colorado was in the beginning a part of Kansas. Utah was included within New Mexico, and Nevada and western Colorado were at first parts of Utah. To readjust the rights so granted to some idea of a right of the States, as now formed, to have a division on some other basis, would seem to be highly inequitable. Furthermore, a determination upon the basis of the Federal grants is the only one that fits the various systems of water law now prevailing and so makes it possible to reconcile conflicts between States having different systems, without disturbance of present rights.

(3) Ownership by the superior sovereign, the United States, of all ungranted water, and the Federal origin of all private vested rights in water, necessitate the ignoring of State lines.

What we are dealing with here is the question whether the property rights in this stream are affected by the fact that the stream is crossed by the line between the two States.

It is obvious that if the entire course of the stream were in one State these rights in its waters would in legal contemplation apply to and affect the whole stream from its source to its mouth. This would be so whether the rights were appropriation rights and so absolute in character, or riparian rights and therefore relative. A first appropriator, having the right to use ten cubic feet of water per second on a thousand acres of land at the mouth of the stream, would be entitled to enjoin a diversion made at the source, if he could prove that such diversion interfered with his getting the full amount of water that he was entitled to; similarly, a riparian owner at the mouth of the stream could enjoin a diversion at the source, if it prevented his getting his fair share of the whole stream.

Does the fact that the stream flows partly in one State and partly in another make any difference? If we have succeeded in establishing our basic proposition of Federal ownership, the answer to this question will be found in the consideration of the relation of the United States, as contrasted with that of the States, to the property which belongs to the United States.

The two States here are litigating as political entities having the right to exercise certain of the powers of independent sovereigns. One of them takes the position that such powers as our States possess make them, in the last analysis, the owners of all property within their borders, and entitle them to settle all controversies with regard to property situate within their joint boundaries as they would if they were independent Nations. It is claimed therefore on its behalf that all property rights within the States, regardless of who are the proprietors of them or how their titles were derived, are included in the larger titles of the States and stand or fall therewith.

The questions then are simply, first, whether the property rights of the United States in the public lands and the water flowing thereon are held subject to the will of the United States as a soverign which is superior to the States and supreme in that field, or are held subject to State sovereignty; second, whether the property rights granted by the United States to individuals are held by them as grants from a superior sovereign and protected by that sovereign's constitution and laws, or are held, in the last analysis, as coming from the States and as being subject to destruction by the States, so far as any other sovereign power is concerned; and, third, whether any principle of the relation of the Federal Government to the States compels, or any grant of power to the States permits, State boundaries to control water rights owned by the United States or its grantees.

(a) State lines can not affect rights acquired before the States were created; therefore, in no event could a division between the States wholly disregard private vested rights.

It is clear that grants of water rights, made by the United States before the creation of the States, were not affected by the changing boundary lines of the Territories, and that those rights remain as then created, now that the States have been admitted.

Whether the power of Congress over innavigable waters within the States is limited or unlimited, it is settled that the power of Congress over them, before the States were created, was plenary. See

Shively v. *Bowlby*, 152 U. S. 1;
U. S. v. *Winans*, 198 U. S. 371;
Winters v. *U. S.*, 207 U. S. 564.

The act of 1866 provided that the owners of vested rights in water should "be maintained and protected in the same;" and the act of 1870 declared that all patents should be subject to such rights.

When the States came they found these rights existing. They were vested rights in real property granted not by them nor depending for their existence in any way upon their laws, but granted by the United States, as the proprietor and full sovereign of the whole territory, and protected by its constitution.

These rights can not be bound up in the fortunes of the States as such. New States may be created out of those now existing, or new boundaries between the States may be made. Even the States might cease to exist without such rights being affected.

Nebraska was admitted into the Union in 1867; Colorado, in 1876; Montana, North Dakota, South Dakota, and Washington, in 1889; Idaho and Wyoming, in 1890; Utah, in 1896; and New Mexico and Arizona, in 1906. It will be seen, therefore, that many of the earliest and most valuable water rights date back to territorial days. Even on the Laramie River one of the ditches, and one for which Wyoming seeks protection in this suit, was constructed, according to the list of priorities given in Wyoming's brief (p. 24), in 1868, which was before the admission of Colorado to the Union.

If we are right in our view that State lines can not affect these rights that were acquired when the States were territories, no division of waters between States could be made disregarding vested rights in general, regardless of what the position of rights acquired after the creation of the States might be.

(b) The sovereignty in the United States is vested in the whole people and not in any subdivision of them, and the control and disposition of the property which belongs to the whole people is vested exclusively in Congress.

As was said by Mr. Cooley (Const. Lim., 7th ed., p. 56), "the theory of our political system is that the ultimate sovereignty is in the people from whom springs all legitimate authority." Chief Justice Marshall, in *Cohens* v. *Virginia* (6 Wheat. 264, 389) makes it clear that the people, in whom rests the sovereignty, are not the people of the States as such but the whole people of the Nation.

Our Federal and State governments are merely the means through which the sovereign, which is superior to and behind them both, works its will; and the State constitutions, as well as the activities of the Federal Government, must conform to the Constitution of the United States, which is itself but the creature of the sovereign people. (*Chisholm* v. *Georgia*, 2 Dall. 419, 470–1.) It is elementary that the Federal power is supreme in its sphere.

McCulloch v. *Maryland*, 4 Wheat. 316, 427.
Claflin v. *Houseman*, 93 U. S. 130, 136;
Mondou v. *New York Ry.*, 223 U. S., 1, 57.

Even in the absence of any express grant, Congress would have the power to control and dispose of the property which belongs to the whole people, but Congress is given the power expressly. The grant is without limitation. It is "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The proposition that the control and disposition of the lands and other property of the United States are lodged exclusively in Congress has been examined repeatedly by this court in varying applications and always decided in the affirmative. Among the cases which apply it are:

Wilcox v. *Jackson*, 13 Pet. (1839) 498, 516.
United States v. *Gratiot*, 14 Pet. (1840) 526, 537.
Jourdan v. *Barrett*, 4 How. (1846) 168, 184.
Irvine v. *Marshall*, 20 How. (1857) 558.
Gibson v. *Chouteau*, 13 Wall. 92, 99.
McCarthy v. *Mann*, 19 Wall. 20.

Van Brocklin v. *Tennessee*, 117 U. S. 151, 167.

United States v. *Insley*, 130 U. S. 263.

Redfield v. *Parks*, 132 U. S. 239.

Shively v. *Bowlby*, 152 U. S. 1, 50, 52.

Mann v. *Tacoma Land Co.*, 153 U. S. 273, 283.

Camfield v. *United States*, 167 U. S. 518, 525.

United States v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703.

Stearns v. *Minnesota*, 179 U. S. 223, 251.

Gutierres v. *Albuquerque L. & I. Co.*, 188 U. S. 545, 555.

Kansas v. *Colorado*, 206 U. S. 46, 89.

Light v. *United States*, 220 U. S. 523.

United States v. *Grimaud*, 220 U. S. 506.

Hallowell v. *United States*, 221 U. S. 317, 324.

United States v. *Midwest Oil Co.*, 236 U. S. 459, 474.

Utah Power & Light Co. v. *United States*, 243 U. S. 389.

(c) To allow State lines to limit the United States, or its grantees, in the use or protection of their water rights would be to deny to Congress the right to control and dispose of the property of the United States. Government grants of water rights are made regardless of State lines.

It is impossible to reconcile any controlling effect of State lines upon the use by the United States of the water belonging to it with exclusive and unlimited power in Congress to control the Federal property.

When the States were created no grant of power over such property was given to them and the

Federal Government in no way restricted itself as to how or where its property should be used; on the contrary, the States were required to disclaim any title to the public lands, including, of course, all their incidents, and to declare that they should be at the sole and entire disposition of the United States. Clearly the United States is free to use its property as it sees fit, unless the States have some inherent power over such property and to admit such a power in the States would be to deny that of Congress, and even to deny the paramount sovereignty of the United States within a field set apart to it by the Constitution in the most positive terms.

The uses which the Federal Government has made of the water belonging to it, including its grants of water rights to individuals, have been only such as a private proprietor could make under the common law, if the theater of such proprietor's actions were confined to one State. What the United States has done on its reclamation and other projects has been to use its water on its own lands and to a certain extent on the lands of others wherever it thought best, regardless of State lines. In making its grants of water rights it has given rights in the whole stream and not in particular parts of it.

Conceding, *arguendo*, that a private proprietor, similarly situated, could not do this, especially if the State forbade it, his lack of power would come from his being subject to State authority. It would be because he could not do with his own property that which the State, as his sovereign, forbade and had

the right to forbid. Must it not follow that if the United States can not reclaim its lands situate on both sides of a State line, using the water where it thinks best, regardless of that line, the States and not the United States are in reality the paramount owners of the property of the United States and the true sovereigns with regard to it? If the States can say to the United States "You must use your property here, and not there," it can only be because they have the sovereign right to control that property; in which case they, instead of Congress, become the disposers of the property of the United States.

The Federal Government, being competent to use the water belonging to the United States, regardless of State lines, can grant that right to others. As was said in *Irvine* v. *Marshall*, *supra* (20 How. 558, 563), the control and the disposing power of Congress over the Federal property is not dependent upon locality but "must be exclusively in the United States anywhere and everywhere within their own limits." The United States "can prohibit absolutely or fix the terms upon which its property may be used" (*Light* v. *United States*, supra, 220 U. S. 523, 536); and so, it follows, can allow its grantee to use the water where it could use it itself. To deny that right would be to put an important limitation upon the disposing power of Congress.

We are not dealing here with the power of the States to condemn water rights, after they have come into the hands of private persons, or with their right, either before or after such acquisition, to seek as against

another State or its citizens the definition, the setting off or the protection of those rights, but merely with the right of the United States to give to the individual a vested interest in water with the right to use and protect it as granted, unless and until it is condemned and paid for. A water right granted for use on land immediately across the State line would be practically useless unless the future diversions from the stream above and on the other side of the line had to respect the prior grant. The United States can place a restriction or burden of this character upon its own property which can not be taken away from the Federal grantee, at least without compensation.

It can not well be argued that Congress has not intended to grant water rights that shall be effective regardless of State lines. As we have already pointed out, the Act of 1866 provided that the "owners of such vested rights shall be maintained and protected in the same;" and the Act of 1870 provided that all patents granted should be subject to such rights.

Almost all of the reclamation projects depend upon interstate waters. The grants of water rights to the settlers on these projects are grants of rights in all the project waters. If such rights were invalid or could be construed as intended to be affected by State lines, they would have to be readjusted or modified; and that would almost certainly disastrously affect a great number of the projects.

Under the North Platte project, for instance, lands in both Wyoming and Nebraska are irrigated; and it happens that the greater part of the lands, that it

was found feasible to include in the project, are situated in Nebraska. The water comes from the North Platte River, which flows through both States; and, since all but the high-water flow was already appropriated, the project depends largely upon waters stored in the Pathfinder Reservoir, which is situate in Wyoming. The whole project was founded upon that reservoir. The grants of water rights to the Nebraska settlers are grants of rights in the water stored in that reservoir, and they derive almost their whole value from that fact.

(d) Rights granted by the United States to individuals are not included in and do not stand and fall with the rights of the States.

Colorado's contention, that this controversy should be decided as though it were one between independent nations, falls to the ground when once it is conceded that the water rights here involved come from the United States and are protected by its sovereign power.

The reason that the private rights of a country's citizens are included in the larger rights of the nation, and stand or fall with those rights, is that private rights come from, are dependent upon, and may be destroyed by the sovereign power of the nation. This is clearly set forth in the passages from Vattel's Law of Nations (1872 edition, Chitty), quoted in Colorado's brief (pp. 16–19).

If a political entity can not order its internal affairs as it will, free from external control, and, in the society of nations, speak the last word with

regard to all within its dominions, it is not an independent nation. As was said by Chief Justice Marshall in *Schooner Exchange* v. *McFadden* (7 Cranch, 116, 136):

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

If the United States never owned any property in Colorado and Wyoming, and all private rights in those States came from the States themselves, existed by virtue of the sovereign power of those States, and could be destroyed by that power, it could be said that the private rights here involved would stand or fall with the larger rights of the States. In such a case private rights in an interstate stream would be limited by the division made between the two States, upon the theory that the States had rights against each other *in invitum* and that the States, in granting rights to their citizens, had assumed to dispose of that which was not theirs to give. If either State, in the last analysis, owned

all of the rights it assumed to deal with, except as against the other State, it could by its laws allow its citizens to have vested rights in them, but to the extent that it would have to account to the other State it, of course, would, as against that other State, have nothing to grant.

The situation here is in fact far otherwise. The ungranted waters of the Laramie River, if there are any, are the property of the superior sovereign, the United States, and so are wholly removed from State control or the effect of litigation between the States. The water grants came from the United States, exist by virtue of the sovereign power of the United States, are protected by the Fourteenth amendment of the Constitution of the United States, and can only be destroyed by the exercise of the sovereign power of the people of the whole Nation.

The cases of *Kansas* v. *Colorado*, supra (206 U. S. 46), and *Rickey Land and Cattle Company* v. *Miller & Lux*, supra (218 U. S. 258), are not authorities to the contrary. In *Kansas* v. *Colorado*, the rights of the private persons and corporations, who were made defendants with the State of Colorado, were not considered; and it was said (p. 85) that if the cause failed against Colorado it would fail also against them. Similarly, in the *Rickey* case it was said (p. 261) that in a suit between two States over the waters of an interstate stream, if a private owner should derive any advantage from the decision, it would not be in his own right, but by reason of and subordinate to the rights of his State.

In neither of these cases were the rights of the United States as a proprietor before the court or in any way considered. Also, in neither of them were the rights of grantees of the United States as such taken into account or presented to the court for consideration. We respectfully submit that all that was in mind in those cases, so far as it affects the question here, was the situation that would result if private rights in nonnavigable waters came from the States and depended for their existence upon inherent State power.

In *Howell* v. *Johnson*, supra, 89 Fed. 557, 559, water rights in a stream flowing from Montana into Wyoming were involved. The district court said: "It is urged that in some way the State of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them." Again, the court said that to hold that rights in Montana were superior to a prior right in Wyoming, would be to "uphold the view that a State might interfere with the primary disposal of the land of the National Government," and "when a party has obtained title to property from the National Government, the State Government has no right to destroy that title, except under the power of eminent domain. The State of Montana can not step in, and say 'the right to the water of Sage Creek, which the plaintiff acquired under the laws of Congress, you can not exercise in this State.'"

In a case involving rights in this same stream (*Bean* v. *Morris*, 221 U. S., 485), this court recognized the im-

portance vested rights would have in a controversy between States. In that case the prior vested rights of Morris, an appropriator in Wyoming, were upheld against the rights of water users in Montana. The case was decided upon the principle that the two States would be presumed to be willing to ignore boundaries and permit overlapping rights, and the question of whether Morris was not protected by the Constitution, was not passed upon. However, the opinion, which was delivered by Mr. Justice Holmes keeps in view the importance that vested rights, protected by the Constitution, would have in a controversy between States. It says (p. 486):

> We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to *vested private rights, if any, protected by the Constitution*, the State of Montana has full legislative power over Sage Creek while it flows within that State.

and again (p. 488):

> So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat.

The States' power to condemn private rights is immaterial here. It is not because a nation can acquire the rights of its subjects, by making just compensation, that its rights, as an independent sovereign power, include the lesser rights of its citizens. In our States the possession of the

power to condemn private property rights is perfectly consistent with the fact that such rights come from and are protected by another and superior sovereignty. In this case, the particular private rights in question can not stand or fall with the rights of the two States, because they come from the United States and are protected by the Fourteenth Amendment, which brushes the States aside and throws its mantle of protection over the individual directly.

(e) State equality, jurisdiction, or preservation does not demand that State lines shall control.

To admit the right of the United States to use its property in water regardless of the artificial boundaries created by State lines, is merely to say that the judgment of Congress and not that of the States is to control the use of the Federal property. That property is "constructively without the legal territorial jurisdiction of individual States in every respect, and for every purpose" (*McCulloch* v. *Maryland*, 4 Wheaton 316, 395). Its being so does not interfere with the jurisdiction of the States, everywhere within their boundaries, over all their proper subjects. It does not deny State powers as such, but simply limits the field of their operation. Those powers remain intact and are the same in all of the States, regardless of how much or how little Federal property may be within them, or what use the Federal Government makes of it. State police power, subject to the protection of private rights given by the Constitution, remains fully operative

over all persons and property subject thereto, including the Federal grantees and their property rights. This court said in *Van Brocklin* v. *Tennessee*, supra:

> We take it to be a point settled beyond all contradiction or question that the State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use of the Government of the United States. Coe v. Errol, 116 U. S. 517–524.

Disregarding State lines here does not interfere with equality between the States. It is true that the new States are admitted on an equal footing with the old, but that equality is one of powers, not of subjects upon which to exercise those powers. There may be more public land in one State than another, or a greater proportion of public land, and so less land under State control in one State than another, but no one would now argue, for instance, that State equality demands a State power to tax the Federal property. The Federal Government may reserve its land in one State, for forest purposes, for instance, and it may do so indefinitely (*Light* v. *United States* supra), while making no reservations in another. No inequality between the States is created thereby; nor is it by the Federal Government's using or granting its property in water for use on either side of a State line.

State preservation does not depend upon the States having the power to say where these water rights shall be used. The waters belonging to the Federal Government are no more essential to the existence and prosperity of the State than are the lands over which it flows and without control of which the water could not be obtained or used.

The possibility that the United States might so dispose of the waters of a stream as to work injustice, can not be considered here. (See *Stearns* v. *Minnesota*, 179 U. S. 242). Such possibilities are always inherent in the possession of ultimate power. The final right must rest somewhere, and, with regard to the Federal property, it rests in the Federal Congress. The safeguard is the participation of all of the States and all of the people in the determination of the Federal action.

Viewed as property, the public domain is strictly national. (*Irvine* v. *Marshall*, *supra*.) While there are references in some opinions to the holding of property by the United States in a "private capacity," or as an "ordinary proprietor" (see *Ft. Leavenworth Co.* v. *Lowe*, 114 U. S. 525, 526; *Ward* v. *Race Horse*, 163 U. S. 504, 514; *Chicago, R. I. & P. Ry. Co.* v. *McGlinn*, 114 U. S. 525, 547), these were merely convenient expressions to distinguish the general mass from property over which the Government has exclusive jurisdiction or property devoted to strictly Governmental purposes. Properly speaking, the United States never holds property in a private capacity, but always for public objects. (*Van*

Brocklin v. *Tennessee*, 117 U. S. 161.) It has been repeatedly held by this court that the public lands are held in trust for the benefit of all the people. *Light* v. *United States*, 320 U. S. 523, 537; *Causey* v. *United States*, 240 U. S. 399, 402. The circumstance that public lands and the waters on them are situate within a particular State can not give to that State or its people any greater power over them or interest in them as property than is shared by all the States and people of the country.

The very purpose of the people, in granting the express power we have been considering, was to insure that the disposition, control and management of the common estate should be vested in the legislature of the common Government. The power of Congress is absolutely exclusive in this field and it is so because it is the property of the whole people that is dealt with.

In *McCulloch* v. *Maryland*, *supra*, this court said (p. 427):

> If any one proposition could command the universal assent of mankind we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts. * * *

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, *and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.* This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

And again in the same case (p. 431),

> Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

"In other words," said this court in the case of *South Carolina*, 199 U.S. 437, 456, "We are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State."

CONCLUSIONS AS TO PRINCIPLES GOVERNING THIS CONTROVERSY AND THEIR APPLICATION.

We respectfully submit that in view of the foregoing the principles that should govern the determination of this cause are as follows:

1. The substantial rights which exist in nonnavigable waters, while they are in their natural state, are rights of use. These rights of use are real property rights of the highest dignity and value under both the riparian and the appropriation systems. These rights at common law are part and parcel of the lands bordering on the waters in which they exist and they belong to the owners of such lands as incidents of their title to the lands themselves, and may be transferred with or without the land. A sole owner of all the riparian land may grant such rights as he pleases, making them absolute or relative as he sees fit and allowing their use within or without the watershed.

2. The United States, as the sole owner of the public domain, originally owned all of the waters flowing thereon, or, more accurately, all of the rights to their use, as a proprietor, and so could transfer them as it saw fit. The United States under the Act of 1866 grants these rights either as appropriation or riparian rights, or both, using the local laws as subordinate instrumentalities only. All rights not so granted still belong to the United States and may be reserved or otherwise disposed of as Congress wills.

3. The power of Congress over the property of the United States is without limitation and exclusive, and so is wholly free from State control. The States have no power over the innavigable waters within their borders, except the same power that they have over lands, namely, the police power and the power of eminent domain. These powers can not be exercised upon the property of the United States.

4. The power of the United States to use the water rights belonging to it or to permit their use by others was not controlled by territorial lines fixed or changing, and is not controlled by State lines. Ownership of a water right necessarily includes the ownership of the right to use water at a particular place, together with the right to have the water flow down to that place uninterfered with by persons above.

5. The Federal Government's grantees of water rights take title to those rights with all their incidents, as vested rights in real property, protected by the Fourteenth Amendment and the laws of Congress. Their rights can only be divested by due process of law and must be respected until so divested.

6. The States, either as the ultimate owners of property within their borders (except that belonging to the United States) or otherwise, own only such water rights as have been granted by the United States to them or to others for use on lands within their borders.

Applying these principles to the case at bar, we submit that the particular diversion made in Colorado and complained of by Wyoming should not

be enjoined unless it does or will interfere with prior appropriations, that is to say, prior grants by the Federal Government, of water in Wyoming; but if it does or will so interfere, it should be enjoined to that extent.

JOHN W. DAVIS,
Solicitor General.

FRANCIS J. KEARFUL,
Assistant Attorney General.

JOHN F. TRUESDELL,
ETHELBERT WARD,
Special Assistants
to the Attorney General.

DECEMBER, 1917.

O

REPLICATION TO THE ANSWER OF DEFENDANT, THE STATE OF COLORADO

SUPREME COURT OF THE UNITED STATES

No. [redacted] Original

THE STATE OF WYOMING, COMPLAINANT,

v.

THE STATE OF COLORADO, THE CHEESLEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION,

DEFENDANTS.

IN EQUITY

In the Supreme Court of the United States

No. 8 ORIGINAL

THE STATE OF WYOMING,
Complainant,
vs.
THE STATE OF COLORADO, The Greeley-Poudre Irrigation District, a municipal corporation, The Laramie Poudre Reservoirs and Irrigation Company, a corporation,
Defendants.

IN EQUITY

REPLICATION TO THE ANSWER OF DEFENDANT, THE STATE OF COLORADO

The complainant, The State of Wyoming, repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the answer of the defendant, The State of Colorado, for replication thereunto saith that it will aver and prove its bill of complaint herein to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this re-

pliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

DOUGLAS A. PRESTON,
Attorney General of the State of Wyoming and Solicitor and of Counsel for the Plaintiff.

N. E. CORTHELL,
JOHN W. LACEY,
Of Counsel.

THE REPLICATION OF THE COMPLAINANT, THE STATE OF WYOMING, TO THE JOINT AND SEVERAL ANSWER OF THE DEFENDANTS, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY AND THE GREELEY-POUDRE IRRIGATION DISTRICT.

SUPREME COURT OF THE UNITED STATES

No. [redacted] 8

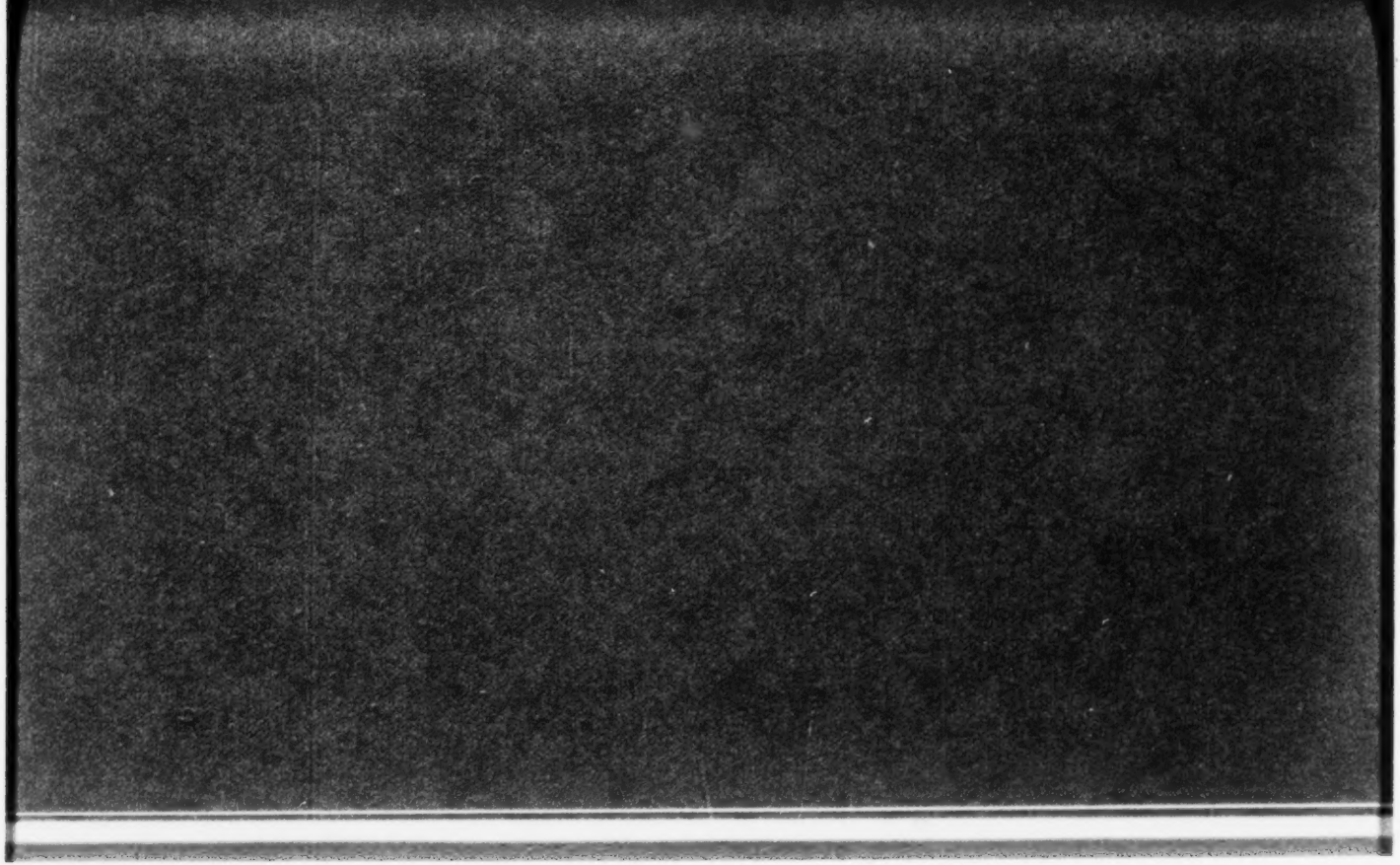
THE STATE OF WYOMING, COMPLAINANT,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION,

DEFENDANTS.

IN EQUITY.



In the Supreme Court of the United States

No. 8 Original

THE STATE OF WYOMING,
Complainant,
vs.
THE STATE OF COLORADO, The Greeley-Poudre Irrigation District, a municipal corporation, The Laramie Poudre Reservoirs and Irrigation Company, a corporation,
Defendants.

IN EQUITY

THE REPLICATION OF THE COMPLAINANT, THE STATE OF WYOMING, TO THE JOINT AND SEVERAL ANSWER OF THE DEFENDANTS, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY AND THE GREELEY-POUDRE IRRIGATION DISTRICT.

This repliant, The State of Wyoming, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the joint and several answer of the defendants, The Laramie-Poudre Reservoirs and Irrigation Company and The Greeley-Poudre Irrigation District, to the bill of com-

plaint of this repliant, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

DOUGLAS A. PRESTON,
Attorney General of the State of Wyoming and Solicitor and of Counsel for the Plaintiff.

N. E. CORTHELL,
JOHN W. LACEY,
Of Counsel.

IN THE

Supreme Court of the United States

NO. 7 5 3 ORIGINAL.

THE STATE OF WYOMING, *Complainant*,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION, *Defendants*.

IN EQUITY.

APPLICATION FOR APPOINTMENT OF COMMISSIONER TO TAKE TESTIMONY.

DOUGLAS A. PRESTON,
Attorney-General of the State of Wyoming and Solicitor and of Counsel for the Plaintiff.

FRED FARRAR,
Attorney-General of the State of Colorado and Solicitor for said State, Defendant.

CHARLES F. TEW,
D. E. CARPENTER,
Solicitors for the Greeley-Poudre Irrigation District, Defendant.

JULIUS C. GUNTER,
Solicitor for the Laramie-Poudre Reservoirs and Irrigation Company, Defendant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 8. ORIGINAL.

THE STATE OF WYOMING, *Complainant*,
vs.
THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION, *Defendants*.

IN EQUITY.

APPLICATION FOR APPOINTMENT OF COMMISSIONER TO TAKE TESTIMONY.

Come now the complainant and the defendants in the above entitled cause, by their respective attor-

neys, and move the Court that Clyde N. Watts, of Cheyenne, State of Wyoming, and Newton Garbutt, of Denver, State of Colorado, be appointed special commissioners to take the testimony in this cause as per stipulation hereto attached.

DOUGLAS A. PRESTON,
Attorney-General of the State of Wyoming and Solicitor and of Counsel for the Plaintiff.

FRED FARRAR,
Attorney-General of the State of Colorado and Solicitor for said State, Defendant.

CHARLES F. TEW,
D. E. CARPENTER,
Solicitors for the Greeley-Poudre Irrigation District, Defendant.

JULIUS C. GUNTER,
Solicitor for the Laramie-Poudre Reservoirs and Irrigation Company, Defendant.

IN THE

Supreme Court of the United States

No. 8. ORIGINAL.

THE STATE OF WYOMING, *Complainant*,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION, *Defendants*.

IN EQUITY.

STIPULATION.

Subject to the order and consent of the Court, it is hereby stipulated by and between the complainant and defendants, by their respective attorneys, that Clyde M. Watts, of Cheyenne, State of Wyoming, be appointed a special commissioner to take and return the testimony in this cause, offered on behalf of the complainant.

That Newton Garbutt, of Denver, State of Colorado, be appointed a special commissioner to take

and return the testimony in this cause offered on behalf of the defendants, or any of them.

That each shall have the power of a Master in Chancery, as provided in the rules of this Court, but said commissioners shall not make any findings of fact or state any conclusions of law.

It is further stipulated that the taking of testimony on complainant's behalf shall begin on the 15th day of August, 1913, at such place as counsel for complainant may designate, ten days notice thereof to be given to counsel for defendants, and shall be concluded within one hundred days thereafter; and the taking of the testimony on behalf of the defendants shall commence on or before fifteen days after the conclusion of the testimony offered on behalf of the complainant and shall be concluded within one hundred days thereafter; and the testimony in rebuttal shall be commenced on or before ten days after the conclusion of the testimony offered on behalf of defendants, five days notice of the place being given, and shall be concluded within forty days thereafter.

The said commissioners shall receive, as agreed by the parties, as their sole compensation for all services and for all testimony taken and transcribed, the sum of fifteen cents per folio for the original transcript and the further sum of five cents per folio for each carbon copy thereof, together with actual and necessary traveling expenses incurred in the taking of the testimony as aforesaid. Dated this 26th day of May, 1913.

DOUGLAS A. PRESTON,
Attorney-General for the State of Wyoming and Solicitor and of Counsel for the Plaintiff.

FRED FARRAR,
Attorney-General of the State of Colorado and Solicitor for said State, Defendant

CHARLES F. TEW,
D. E. CARPENTER,
Solicitors for the Greeley-Poudre Irrigation District, Defendant.

JULIUS C. GUNTER,
Solicitor for the Laramie-Poudre Reservoirs and Irrigation Company, Defendant.

APPLICATION FOR LEAVE TO FILE REPLICATIONS.

SUPREME COURT OF THE UNITED STATES

No. [redacted] ORIGINAL [redacted] 8

THE STATE OF WYOMING, COMPLAINANT,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION,

DEFENDANTS.

IN EQUITY

In the Supreme Court of the United States

No. 8 ORIGINAL

THE STATE OF WYOMING,
Complainant,
vs.
THE STATE OF COLORADO, The Greeley-Poudre Irrigation District, a municipal corporation, The Laramie Poudre Reservoirs and Irrigation Company, a corporation,
Defendants.

IN EQUITY

APPLICATION FOR LEAVE TO FILE REPLICATIONS

Comes now the said complainant, The State of Wyoming, and hereby makes application to the said Honorable Court for leave to file its replication to the separate answer of the defendant, The State of Colorado, and its replication to the joint and several answer of the defendants, The Greeley-Poudre Irri-

gation District and The Laramie-Poudre Reservoi
and Irrigation Company, in said cause, and co
plainant will ever pray, etc.

DOUGLAS A. PRESTON,

Attorney General of the State of Wyomi
and Solicitor and of Counsel
for the Plainti

N. E. CORTHELL,
JOHN W. LACEY,

Of Counsel.

In the Supreme Court of the United States

No. 8 Original

THE STATE OF WYOMING,
Complainant,
vs.
THE STATE OF COLORADO, The Greeley-Poudre Irrigation District, a municipal corporation, The Laramie Poudre Reservoirs and Irrigation Company, a corporation,
Defendants.

IN EQUITY

NOTICE

To The State of Colorado, The Greeley-Poudre Irrigation District, and The Laramie-Poudre Reservoirs and Irrigation Company,
Defendants.

You will please take notice that at the incoming of the Supreme Court of the United States at twelve o'clock M., at the Capitol Building, April 1, 1913,

or as soon thereafter as solicitors can be heard, th
above named complainant will appear by its solicitor
and present to said court an application for leave t
file its replication to the separate answer of the defend-
ant, the State of Colorado, and its replication to the
joint and several answer of the defendants, the Greeley-
Poudre Irrigation District and the Laramie Poudre
Reservoirs and Irrigation Company, in said cause:
when and where you may be present if you so desire.
A copy of which application is presented herewith.

DOUGLAS A. PRESTON,

Attorney General of the State of Wyoming
and Solicitor and of Counsel
for the Plaintiff.

N. E. CORTHELL,
JOHN W. LACEY,

Of Counsel.

STATE OF COLORADO,
County of Denver, } ss.

Service of the foregoing notice, by the delivery to me of a copy thereof with a copy of the foregoing application for Leave to File Replications, is hereby acknowledged, this _____ day of March, A. D. 1913.

_____

_____

_____

_____

_____

_____

Attorney General of the State of Colorado and Solicitor for said State,
Defendant.

_____

Solicitor for the Greeley-Poudre Irrigation District,
Defendant.

_____

Solicitor for the Laramie-Poudre Reservoirs and Irrigation Company,
Defendant.

In the Supreme Court of the United States

OCTOBER TERM, 1[redacted] 1917

No. [redacted] 8

IN EQUITY.

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE-POUDRE RESERVOIRS & IRRIGATION COMPANY,
Defendants.

MOTION TO ADVANCE CAUSE AND TO FIX TIME FOR FILING OF BRIEFS, AND NOTICE.

LESLIE E. HUBBARD,
Attorney General of the State of Colorado,
AND FRED FARRAR,
Solicitors for the Defendant, the State of Colorado.

JULIUS C. GUNTER,
Solicitor for the Defendant, The Laramie-Poudre Reservoirs & Irrigation Company.

DELPH E. CARPENTER,
Solicitor for the Defendant, The Greeley-Poudre Irrigation District.

The Clark QUICK-Printing Co., Lawrence 1332-34, Denver, Colo.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 7, ORIGINAL.

IN EQUITY.

THE STATE OF WYOMING,

Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE-POUDRE RESERVOIRS & IRRIGATION COMPANY,

Defendants.

MOTION TO ADVANCE CAUSE AND TO FIX TIME FOR FILING OF BRIEFS.

Come now the defendants herein, by their respective solicitors, and respectfully represent:

That on the 6th day of March, 1917, this Honorable Court ordered a re-argument of the above entitled cause, requesting counsel to direct their attention specifically to certain matters mentioned in said order, and instructed the Clerk to notify the Attorney General of the United States of such order for re-argument.

The defendants therefore respectfully move that this cause be advanced upon the docket and set for re-argument at a day as early as circumstances permit, and that a rule be entered fixing the time for filing the briefs herein, affording reasonable opportunity to the defendants to file briefs in reply to any that may be filed by the plaintiff and by the United States or any department of the Government.

Respectfully submitted,

LESLIE E. HUBBARD,
Attorney General of the State of Colorado,

AND FRED FARRAR,
Solicitors for the Defendant, the State of Colorado.

JULIUS C. GUNTER,
Solicitor for the Defendant, The Laramie-Poudre Reservoirs & Irrigation Company.

DELPH E. CARPENTER,
Solicitor for the Defendant, The Greeley-Poudre Irrigation District.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 7, ORIGINAL.

IN EQUITY.

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE-POUDRE RESERVOIRS & IRRIGATION COMPANY,
Defendants.

NOTICE.

To the Honorable Thomas W. Gregory,
Attorney General of the United States,

and

To the Honorable Douglas A. Preston,
Attorney General of the State of Wyoming:

You are notified that on Monday, the 4th day of June, 1917, or as soon thereafter as counsel can be heard, the defendants herein will appear before the Supreme Court of the United States, at Washington, D. C., and ask leave to file and present a

motion herein, asking that this cause be advanced and set down for hearing, and that a rule be entered fixing the time for filing the briefs herein; a copy of which motion is hereunto attached.

Dated at Denver, Colorado, this 18th day of May, 1917.

LESLIE E. HUBBARD,
Attorney General of the State of Colorado,
AND FRED FARRAR,
Solicitors for the Defendant, the State of Colorado.

JULIUS C. GUNTER,
Solicitor for the Defendant, The Laramie-Poudre Reservoirs & Irrigation Company.

DELPH E. CARPENTER,
Solicitor for the Defendant, The Greeley-Poudre Irrigation District.

NO. 7. ORIGINAL IN EQUITY. 1918

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, a Municipal Corporation, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, a corporation,
Defendants.

MOTION

DOUGLAS A. PRESTON,
Attorney General of Wyoming, of Counsel for Plaintiff.

FRED FARRAR,
Attorney General of Colorado, of Counsel for Defendant State of Colorado.

JULIUS C. GUNTER,
Attorney for Defendant Laramie-Poudre Reservoirs & Irrigation Company.

DELPH E. CARPENTER,
Attorney for Defendant Greeley-Poudre Irrigation District.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE STATE OF WYOMING,
Complainant.

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, a Municipal Corporation, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, a corporation,
Defendants.

No. 7.
ORIGINAL IN EQUITY.

MOTION

Come now the above named parties by their respective counsel and show unto the court that the taking of evidence in said cause has been completed and that the parties have agreed upon an abstract thereof embracing such of the exhibits as may be readily reproduced, and to expedite the final hearing of said cause the parties do jointly move the court as follows:

1. That permission be granted to file herein for reference the original typewritten transcript of the evidence together with all exhibits introduced by the respective parties, and that the abstract of the testimony as agreed upon by the parties, together with the selected exhibits, be printed at the joint expense of the parties and filed herein in lieu of printing the entire transcript.

2. That an order be entered granting unto the plaintiff to and including July 15, 1916, within which to file a brief herein and granting unto the defendants to and including September 5, 1916, within which to file their briefs herein, and granting unto the plaintiff twenty days after the filing of the briefs on behalf of the defendants within which to file its reply brief.

3. That an order be entered herein advancing this cause upon the calendar and assigning it for argument upon the first day of the October, A. D. 1916, term of this court, or as soon thereafter within said term as to the court shall be convenient, and enlarging the time for oral argument to four hours upon each side.

DOUGLAS A. PRESTON,
Attorney General of Wyoming, of Counsel for Plaintiff.

FRED FARRAR,
Attorney General of Colorado, of Counsel for Defendant State of Colorado.

JULIUS C. GUNTER,
Attorney for Defendant Laramie-Poudre Reservoirs & Irrigation Company.

DELPH E. CARPENTER,
Attorney for Defendant Greeley-Poudre Irrigation District.

In the Supreme Court of the United States.

IN EQUITY.

NO. 20. ORIGINAL.

THE STATE OF WYOMING, Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, A MUNICIPAL CORPORATION, THE LARAMIE-POUDRE RESERVOIRS AND IRRIGATION COMPANY, A CORPORATION, Defendants.

DEMURRER.

To the Honorable, the Judges of the Supreme Court of the United States:

The defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and

form as the same are therein set forth and alleged, demur to the said bill, and for cause of demurrer show:

I.

That said bill of complaint is wholly without equity, in that it does not state or show any such cause as doth or ought to entitle complainant to the relief sought or prayed for against these defendants or against either thereof, or to any relief whatever.

Wherefore, and for divers other good causes for demurrer appearing on the face of said bill, these defendants demur thereto and pray the judgment of this Honorable Court whether they or either of them shall be compelled to make further or any answer to said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

Attorney General of the State of Colorado, Defendant.

Solicitors for the Greeley-Poudre Irrigation District, Defendant.

Julius C. Gunter

Charles R. Hughes

Clyde C. Dawson

Solicitors for the Laramie-Poudre Reservoirs and Irrigation Company, Defendant.

Of Counsel.

We hereby certify that we are solicitors and of counsel for each of the defendants above named, and that in our opinion the foregoing demurrer of said defendants respectively to the bill of complaint of the said State of Wyoming is well founded in point of law and proper to be filed in the above cause.

Barry Griffith

Julius C. Gunter

Charles D. Hazlett

Clyde E. Dawson

Solicitors and of Counsel for Defendants above named.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO, } ss.

Benjamin Griffith, being duly sworn, deposes and says that he is the Attorney General of the State of Colorado, one of the defendants named in the foregoing demurrer, and is authorized to verify the same on behalf of said defendant and the other defendants named, and that the foregoing demurrer is not interposed to delay the cause or any proceeding therein.

Benjamin Griffith

Subscribed and sworn to before me this 28th day of December, A. D. 1911.

My commission expires December 13, 1914

John B. Rote
Notary Public.